DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-626
Title: Fane Lozman, Petitioner
v.
The City of Riviera Beach, Florida
Docketed: November 21, 2011
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (10-10695)
Decision Date: August 19, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 17 2011	Petition for a writ of certiorari filed. (Response due December 21, 2011)
Dec 13 2011	Order extending time to file response to petition to and including January 20, 2012.
Dec 19 2011	Motion for leave to file amicus brief filed by The Maritime Law Association of the United States
Jan 20 2012	Brief of respondent The City of Riviera Beach, Florida in opposition filed.
Jan 31 2012	Reply of petitioner Fane Lozman filed. (Distributed)
Feb 1 2012	DISTRIBUTED for Conference of February 17, 2012.
Feb 21 2012	Petition GRANTED.
Feb 21 2012	Motion for leave to file amicus brief filed by The Maritime Law Association of the United States GRANTED.
Mar 8 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 7, 2012.
Mar 8 2012	The time to file respondent's brief on the merits is extended to and including July 10, 2012.
May 4 2012	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including May 8, 2012.
May 4 2012	The time to file respondent's brief on the merits is further extended to and including July 12, 2012.
May 8 2012	Joint appendix filed. (Statement of costs filed)
May 8 2012	Brief of petitioner Fane Lozman filed.
May 15 2012	Brief amicus curiae of the Solicitor General filed.
May 15 2012	Brief amici curiae of Seattle Floating Homes Association, et al. filed.
May 15 2012	Brief amicus curiae of American Gaming Association filed.
May 15 2012	Brief amici curiae of Maritime Law Professors filed.
Jun 27 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party.

	received from counsel for the petitioner
Jul 10 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent .
Jul 12 2012	Brief of respondent The City of Riviera Beach, Florida filed.
Jul 19 2012	Brief amici curiae of Thirty-six Admiralty and Maritime Law Professors filed. (Distributed)
Jul 19 2012	Brief amicus curiae of United Brotherhood of Carpenters and Joiners of America filed. (Distributed)
Jul 19 2012	Brief amicus curiae of Maritime Law Association of the United States filed. (Distributed)
Jul 19 2012	Brief amicus curiae of Professor Kevin M. Clermont filed.
Jul 19 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 19 2012	Brief amicus curiae of National Marine Bankers Association filed. (Distributed)
Jul 23 2012	SET FOR ARGUMENT ON Monday, October 1, 2012
Jul 24 2012	CIRCULATED.
Aug 3 2012	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Aug 7 2012	Reply of petitioner Fane Lozman filed. (Distributed)
Aug 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 14 2012	The parties are directed, and the Solicitor General is invited, to file letter briefs addressing the following question: The res in this putative in rem admiralty proceeding was sold at a judicial auction in execution of the district court s judgment on a maritime lien and a maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the res render this case moot? The briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Tuesday, August 28, 2012.
Aug 28 2012	Supplemental brief of the Solicitor General filed. (Distributed)
Aug 28 2012	Supplemental brief of petitioner Fane Lozman filed. (Distributed)
Aug 28 2012	Supplemental brief of respondent The City of Riviera Beach, Florida filed. (Distributed)
Sep 10 2012	U.S. D.C. for Southern District of Florida. (1 box)
Oct 1 2012	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: David C. Frederick, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 11-626

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a floating structure that is indefinitely moored receives power and other utilities from shore and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fane Lozman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *City of Riviera Beach v. That Certain Unnamed Gray*, 643 F.3d 1259 (11th Cir. 2011).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 643 F.3d 1259. The opinion of the United States District Court for the Southern District of Florida (Pet. App. 33a) is unpublished, but is appended at Pet. App. 33a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on August 19, 2011. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

In relevant part, 1 U.S.C. § 3 provides: "the word 'vessel' includes every description of watercraft or other artificial contrivance used as a means of transportation on water."

28 U.S.C. § 1333 provides, in relevant part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the state, of: (1) any civil case of admiralty or maritime jurisdiction."

46 U.S.C. § 31342 provides, in relevant part: "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien."

STATEMENT OF THE CASE

This case presents a frequently recurring and pivotal question of federal maritime law: whether the term "vessel" extends to a floating structure that is indefinitely moored to shore and that is not intended for use in maritime transport. The Eleventh Circuit Court of Appeals, applying a definition of "vessel" that it adopted three years earlier and that it has conceded conflicts with the definition of "vessel" adopted by the Fifth and Seventh Circuits, held that such a structure is indeed a "vessel."

1. In 2002, Fane Lozman purchased what Florida law calls a "floating residential structure," Pet. App. 12a n.6, and what is known in this case's caption in the lower courts (but at no other time) as "That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length." Lozman's floating residential structure was constructed using

methods and materials used for houses on land; it was rectangular in shape and was built out of plywood. It contained no bilge pumps for expelling water during transport; no raked bow (*i.e.*, a bow angled to ease transport); no navigation aids; no lifeboats or other saving equipment; no propulsion; and no steering. The structure had cleats, but they were inappropriate for towing.

The structure is not designed to be used for maritime transport, and Lozman never had any intent to use it that way. Indeed, Lozman's floating home lacked a Hull Identification Number ("HIN") and consequently could not even obtain Coast Guard Certification, which is required for legal navigability.

After purchasing the floating home, Lozman had the structure towed to North Beach Village, Florida, where he resided in it for three years. After Hurricane Wilma struck the area, Lozman had the structure towed to a marina located in the City of Riviera Beach ("the City"). The structure survived each of these voyages, but the towings had detrimental effects on it. The home remained afloat only because emergency repairs were immediately made to prevent it from sinking. Upon arriving at the City's marina and being repaired, the home was moored to the dock by cables and affixed to land-based utilities, including power, sewer lines, cable television, and the internet. Lozman signed a lease with the City and intended to live there indefinitely.

Problems arose, however, between Mr. Lozman and the City when Mr. Lozman filed suit in Palm Beach County Circuit Court alleging that a meeting the City had with private developers interested in developing the marina violated Florida's Sunshine Law, Florida Statute § 286.011. The redevelopment plan subsequently was abandoned.

Soon thereafter, however, the City issued Lozman a notice of eviction from the Marina and filed an eviction suit in Palm Beach County Circuit Court, claiming that Lozman was being evicted because he failed to muzzle his ten-pound dachshund and had used unlicensed repair persons to perform work on his floating home. After a trial, the jury returned a verdict in favor of Lozman, finding that the eviction had been an improper retaliation for Lozman's protected speech.

Later that year, the Riviera Beach City Council passed a revised dockage agreement and accompanying Marina Rules and Regulations. The City thereafter sent Lozman a letter, informing him that the City would revoke his structure's permission to remain in the marina unless Lozman complied with the new requirements, executed the new agreement, and paid allegedly unpaid dockage fees. Lozman did not execute the agreement and his floating home remained in the marina.

2. The City filed an *in rem* suit in admiralty for trespass and to foreclose on a maritime lien on Lozman's floating residential structure in the United

States District Court for the Southern District of Florida. As its basis for jurisdiction, the City invoked 28 U.S.C. § 1333, which vests original and exclusive federal subject matter jurisdiction in federal district courts over admiralty and maritime actions, *see, e.g.*, *The Rock Island Bridge*, 73 U.S. 213 (1867), and the Federal Maritime Lien Act. A maritime lien, in turn, only may be used to collect money for repairs having been performed on a "vessel." As explained in *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010):

> [I]n each iteration of the Federal Maritime Lien Act, the statutory language specifies that only repairs performed on a "vessel" generate a maritime lien. Thus, a ship's characterization as a "vessel" is a mandatory prerequisite to the attachment of a maritime lien. Because a district court's authority to arrest a ship and to adjudicate an in rem proceeding against it requires the attachment of a maritime lien, both the lien and the district court's jurisdiction depend on a ship's status as a "vessel."

The district court granted a warrant for the arrest of Lozman's floating home pursuant to 46 U.S.C. § 31342, which grants a lien to persons providing necessaries to vessels at the request of the owner or a person authorized by the owner. Three U.S. Marshals then arrested Lozman's floating residential structure and had it towed to Miami, Florida. The next day, Lozman, *pro se*, filed an emergency motion to dismiss the complaint and to return his floating residential

structure to the City marina. The district court denied Mr. Lozman's motion three days later.

Subsequently in the litigation, the City filed for partial summary judgment on its trespass claim. In response, Lozman countered that his floating residential structure was not a "vessel" under 1 U.S.C. § 3, which defines the term for purposes of establishing maritime jurisdiction as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," and this Court's construction of that provision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). Instead, Lozman contended that his floating residential structure should be treated the same as a land-based residence and thus that this dispute should be governed by Florida law governing dwellings, including the State's homestead exemption that would prevent the City's arrest of his home.

The district court granted the City's motion, holding along the way that Lozman's floating residential structure was a "vessel" for admiralty jurisdiction purposes. The court further held that Lozman had notice of the withdrawal of permission to remain at the marina and that he remained at the marina after his permission was revoked. Following a bench trial on the issue of damages for the trespass claim and liability and damages for the maritime lien, the district court found Lozman delinquent in his payments to the City marina in the amount of $3,039.88. The district court also awarded the City $1.00 in nominal damages for the trespass. Finally, the district court

also ordered the U.S. Marshals to release Lozman's floating home and to execute its sale to satisfy the judgment.

3. The Eleventh Circuit affirmed. In the court of appeals' view, the "binding precedent" of its own decision in *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299 (11th Cir. 2008), dictated that Lozman's floating structure was a "vessel." In *Belle of Orleans*, the Eleventh Circuit previously had held that a floating structure is a "vessel" so long as it has a "practical capacity for maritime transport." Pet. App. 16a (citing *Belle of Orleans*, 535 U.S. at 1311-12). It is irrelevant under this test whether the structure is moored indefinitely to land by cables or lacks any self-propulsion or motive steering. Pet. App. 17a-18a. Nor does the question whether something is a "vessel" depend under this test "in any way on either the purpose for which the craft was constructed or its intended use," Pet. App. 19a (citing *Belle of Orleans*, 535 F.3d at 1311), or "its present use or station." *Belle of Orleans*, 535 F.3d at 1311. So long as the structure is "capable of moving [under tow] over water" (even if "to her detriment") without sinking, it constitutes a vessel. *Belle of Orleans*, 535 F.3d at 1312. Because Lozman's floating home had been towed previously without sinking, the court held that it was "virtually indistinguishable" from the structure the Eleventh Circuit deemed a vessel in *Belle of Orleans* (a floating casino indefinitely moored to shore). Pet. App. 17a.

In reaching this decision, the Eleventh Circuit openly acknowledged that the Fifth and Seventh Circuits have adopted different tests for determining whether a structure is a "vessel," "both of which focus on the intent of the [structure's owner] rather than" the structure's potential ability to move or be towed across water. Pet. App. 16a (internal quotation marks and citations omitted); *see Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006); *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995). These tests would have precluded Lozman's home from being deemed a vessel because it was indefinitely moored to shore and Lozman intended to make the structure his permanent and stationary dwelling. But, the Eleventh Circuit explained that in *Belle of Orleans* it had squarely "rejected the reasoning of the Fifth and Seventh Circuits." Pet. App. 16a. Accordingly, unlike what would have occurred had his case been litigated in those circuits, the Eleventh Circuit deemed it "of little moment" that Lozman's home "was designed" and was being indefinitely used "as a residence that just happened to float." Pet. App. 19a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals (as well as various state appellate courts) are severely and openly split on the issue of whether a floating, indefinitely moored structure is a "vessel" within the meaning of

1 U.S.C. § 3 and the meaning of this Court's ruling in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). The Eleventh Circuit has established a hard-line test under which any structure possibly capable of movement on water without sinking constitutes a "vessel," regardless of whether the owner intends it to be used for maritime transportation or it is actually used for such transportation. By contrast, the Fifth and Seventh Circuits focus on the owner's intended and actual use of the structure; if a floating structure is not intended ever to be used in maritime transportation or commerce and is indefinitely moored to shore, it is not a vessel.

This Court should resolve this conflict. The question of whether a floating indefinitely moored structure is a vessel for purposes of federal admiralty jurisdiction is important to innumerable private and commercial owners of such structures, as well as to the regulatory ability of state and local governments across the country. Furthermore, the Eleventh Circuit's decision to characterize floating indefinitely moored structures as "vessels" based on any capability to be towed across water without sinking, regardless of the intended use of such structures, is incorrect. Indeed, the Eleventh Circuit's interpretation of *Stewart* and "vessel" is so broad and disconnected to common sense that it would render a wooden garage door a vessel – the very result that Justice Breyer noted would be "absurd" at oral argument in *Stewart*. Transcript of Oral Argument at 12, *Stewart v. Dutra Construction Co.*, 543 U.S. 481

(2005) (No. 03-814). This Court should put an end to this overly expansive test and misinterpretation of *Stewart*.

I. The Eleventh Circuit Is In Direct Conflict With The Fifth And Seventh Circuits As To Whether Floating Indefinitely Moored Structures Are Vessels.

"Vessel" status is a mandatory prerequisite to federal admiralty jurisdiction under 28 U.S.C. § 1333. Pet. App. 12a. In turn, a "vessel . . . includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This statutory provision "codified the meaning that 'vessel' had acquired in general maritime law" and this Court has made clear that courts should "continue to construe § 3's definition in light of the term's established meaning in general maritime law." *Stewart*, 543 U.S. at 490, 492. And historically at maritime law, a floating structure that was indefinitely secured by cables to the mainland and not intended for use in waterborne transport was not a "vessel." *See Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887).

In *Stewart*, this Court unanimously reaffirmed that a harbor dredge is a "vessel." *Stewart*, 543 U.S. at 495; *accord Ellis v. United States*, 206 U.S. 246 (1907); *The Virginia Ehrman and the Agnese,* 97 U.S. 309 (1878). In the course of this uncontroversial

holding, this Court stated for the first time in any case that a floating structure is "capable of" maritime transportation so long as "the watercraft's use 'as a means of transportation on water' *is a practical possibility*" instead of "*merely a theoretical one.*" *Stewart*, 543 U.S. at 496 (emphasis added). This Court also stated that a "vessel" is "any watercraft capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497.

Shortly after *Stewart* was decided, a leading authority on maritime law predicted that "the *Stewart* Court's initiation of a practical vs. theoretical debate is bound to fuel litigation. And the litigation will be messy, because 'merely theoretical' has an unduly manipulable range of meaning." David W. Robertson, *How The Supreme Court's New Definition Of "Vessel" Is Affecting Seaman Status, Admiralty Jurisdiction, And Other Areas of Maritime Law*, 39 J. MAR. L. & COM. 115, 155 (2008).

That prediction has proven correct. In the wake of *Stewart*, the circuits have divided three ways over whether a floating indefinitely moored structure – something previously considered *not* a "vessel" – is now a "vessel" within the meaning of 1 U.S.C. § 3. This conflict begs for a prompt clarification of this Court's opinion in *Stewart*.

1. In determining whether a craft was "rendered practically incapable of transportation or movement," *Stewart*, 543 U.S. at 494, the Eleventh Circuit

reads *Stewart* to require the court to focus on "the capability of the craft, 'not its present use or station.'" Pet. App. 13a (citing *Belle of Orleans*, 535 F.3d at 1310). According to the Eleventh Circuit, the "capability" of the craft now turns solely on whether the structure is physically capable of movement over water without sinking, regardless of the measures that must be taken to render it movable, the damage to the structure resulting from such movement, the infrequency of any such movement (based on necessity), or the intent, construction or use of the structure. Pet. App. 18a-20a. In the Eleventh Circuit's view, "[t]he owner's intentions with regard to a [structure] are analogous to the [structure's] 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose." Pet. App. 16a (quoting *Belle of Orleans*, 535 F.3d at 1311).

Thus, in addition to holding that the floating residential structure at issue here was a "vessel" because it could be unmoored and towed across the water (albeit to its detriment) without sinking, the Eleventh Circuit has held that a riverboat casino that was moored to a dock by steel cables and had electrical, computer and phone cables attached to shore, and which had a working engine and other machinery allowing it to have motive power of its own, was a "vessel." *Belle of Orleans*, 535 F.3d at 1304. The Eleventh Circuit also has held that a yacht that had been drydocked, removed from the water with cranes and disabled for extensive repairs was a "vessel" because it could be dropped back into the water and

"could be towed upon 24 hours notice." *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 875 (11th Cir. 2010). The Eleventh Circuit's interpretation of "practically incapable of transportation" excludes only those structures that under no circumstances can be moved over water without sinking, irrespective of the burden, owner's intent, or efforts required to make the structure ready for transportation.

2. As the Eleventh Circuit itself acknowledged in this case and in *Belle of Orleans*, 535 F.3d at 1311, its test for determining "vessel" status under 1 U.S.C. § 3 conflicts with the tests that the Fifth and Seventh Circuits have adopted and employed in the wake of *Stewart*. Specifically, the Fifth Circuit has held that floating structures that are indefinitely moored to shore and connected to land-based utilities are not vessels, and the Seventh Circuit has held that such structures are not vessels when they are "disabled from sailing."

a. In *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006), the Fifth Circuit held that a structure is "practically incapable of transportation or movement" – and thus not a "vessel" under 1 U.S.C. § 3 as construed in *Stewart* – when it is "indefinitely moored" to shore. *Id.* at 187. Reaffirming its holding in *Pavone v. Mississippi River Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995), that a riverboat that is tied to land by steel pilings, hooked up to land-based utilities, and not intended for any future maritime transportation is not a "vessel," the Fifth Circuit reasoned that "[e]ven after *Stewart*" such structures

are not vessels because "although [they are] still physically capable of sailing, such a use [is] merely theoretical." *De La Rosa*, 474 F.3d at 187-88. The Fifth Circuit found support for continuing to apply its intent-based test not only in the reasoning of *Stewart*, but also in the fact that the *Stewart* Court cited the Fifth Circuit's earlier *Pavone* holding with approval. *See id.* at 188 n.2. Accordingly, unlike the Eleventh Circuit, the Fifth Circuit held in *De La Rosa* that neither having moved across water in the past (as the riverboat at issue there had) nor being physically able to move in the future makes a floating structure a "vessel" when the owner's "intent" is to keep it "indefinitely moored." *Id.* at 187.

b. The Seventh Circuit has adopted yet a third approach to determine whether a structure is a "vessel." Prior to *Stewart*, the Seventh Circuit squarely held with little difficulty that a riverboat casino that was indefinitely moored to land and connected to land-based utilities was not a vessel, even though it could have disconnected from the dock in fifteen to twenty minutes if needed. *Howard v. Southern Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). The Seventh Circuit emphasized that past cases from this Court "did not hinge on whether the vessel was ready and able to cruise, but looked to the vessel's purpose and actual use (whether it was used to move or transport anything)." *Id.* at 857.

Like the Fifth Circuit, and unlike the Eleventh, the Seventh Circuit continues after *Stewart* to refuse to deem a floating structure to be a vessel when it is

permanently moored to shore and is "disabled from sailing." *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012, 1014 (7th Cir. 2006). But, unlike the Fifth Circuit, the Seventh Circuit has hesitated after *Stewart* to adhere entirely to its prior precedent, opining only that "maybe" an indefinitely moored boat that is *not* disabled from sailing ceases to be a "vessel" when "its owner intends that the boat will never again sail." *Id.* at 1016. District courts in the Seventh Circuit, however, have continued to follow the Seventh Circuit's prior precedent entirely, holding that floating indefinitely moored structures are not "vessels" when their owners "intend [them] to be kept out of navigation." *Earls v. Belterra Resort, Ind., LLC*, 439 F. Supp. 2d 884, 890 (S.D. Ind. 2006); *see also Wire v. Showboat Marina Casino P'ship*, 2008 WL 818310, at *6 (N.D. Ill. 2008) (riverboat was not a vessel because there was no evidence "that shows that the [owner] intends ever to move the [structure] from the dock and turn it again into a vessel in navigation").

3. The difficulty *Stewart* has created in determining whether a floating indefinitely moored structure is a "vessel" also has plagued state courts. In *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. Ct. App. 2008), the court outlined the circuit split at issue here and held that an indefinitely moored riverboat was not a "vessel." The Louisiana Court of Appeals recently reached the same conclusion by a three-to-two vote, with the majority expressly following the rationales enunciated in the

Fifth and Seventh Circuits and rejecting the Eleventh Circuit's "broader definition of the term 'vessel.'" *Breaux v. St. Charles Gaming Co.*, 68 So.3d 684, 687 (La. Ct. App. 2011) (floating riverboat that still was physically capable of navigation was not a "vessel" because it was moored to the shore, received utilities from shore, and did not perform any traditional maritime activity).

In contrast, the Illinois Court of Appeals held in *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141 (Ill. App. Ct. 2006), that an indefinitely moored gaming boat was a "vessel," stating that "the intent of the owner at issue does not alter our finding." *Id.* at 146. The New York Court of Appeals (the highest court in the state) similarly has invoked *Stewart* to hold that a stationary barge was a "vessel" because it was towed once a decade for maintenance. *Lee v. Astoria Generating Co.*, 920 N.E.2d 350 (N.Y. 2009).

II. The Question Presented Is One Of Substantial Importance.

There are two overarching reasons why it is important for this Court to resolve the question of whether a floating structure whose owner intends it to remain indefinitely moored to shore is a "vessel."

1. Structures such as the one at issue here are prevalent nationwide, and that prevalence is growing, not abating. For starters, indefinitely moored floating structures are sometimes used as private residences (sometimes called "floating residential structures" or

"floating homes") in areas such as the Florida community at issue here. For example, the cities of Seattle, Washington, and Sausalito, California each have long contained hundreds of such structures.[1] Other cities across the country have them too.

In addition, as the cases cited above show, indefinitely moored floating structures also are commonly used nowadays as casinos, as well as restaurants,[2] and hotels.[3]

2. The question whether a structure constitutes a "vessel," and thus triggers federal maritime law, determines not just the procedural question whether a lawsuit should be filed in federal or state court (although that, in and of itself, is a highly significant matter), but also carries with it a variety of highly substantive consequences. To name just a few:

a. *Homestead exemptions and other local regulations of residences.* Owners of floating homes, unlike

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[1] *See* Floating Homes Association of Seattle, http://www.seattlefloatinghomes.org/; Floating Homes Association of Sausalito, http://www.floatinghomes.org/.

[2] One list of the "top ten" floating restaurants, includes structures in Seattle; Key West, Florida; Portland, Maine; Newport Beach, California; Philadelphia, Pennsylvania; Salem, Massachusetts; San Francisco, California; and Cleveland, Ohio. *See* Coastal Living, *Top 10 Floating Restaurants*, http://www.coastalliving.com/travel/top-10/top-10-floating-restaurants-00400000000324/.

[3] *See, e.g.*, Floating Rooms at Sea Cove Resort and Marina, Florida, http://floatingrooms.com/home.html; RMS Queen Mary Hotel, http://en.wikipedia.org/wiki/RMS_Queen_Mary.

owners of houseboats and yachts that actually are used in navigation, must pay real property taxes and are subject to a variety of other state laws regulating dwellings. For instance, almost every state in the U.S. has a homestead exemption law. Herbert T. Tiffany, *The Homestead Exemption – Scope of Treatment; Nature of Right*, 5 TIFFANY'S REAL PROP. § 1332 (2011). The provisions vary but in general the homestead property is protected from taxation up to a specified amount and is exempt from forced sale from most creditors. *Id.*

This case perfectly illustrates the significance of whether a floating structure is a "vessel" and thus preempts state law. The Florida Constitution exempts homesteads from forced sale from all creditors except the state for unpaid taxes and assessments, mechanics liens to improve the homestead, and mortgages. Fla. Const. art. X, § 4(a); *see also Sherbill v. Miller Mfg. Co.*, 89 So.2d 28, 31 (Fla. 1956) ("no policy of this State is more strongly expressed in the constitution, laws and decisions of this State than the policy of our exemption laws"); *Olesky v. Nicholas*, 82 So.2d 510, 513 (Fla. 1955) ("We find no difficulty in holding that the Florida constitutional exemption of homesteads protects the homestead against every type of claim and judgment except those specifically mentioned in the constitutional provision."). This exemption serves the compelling public purpose of promoting the stability and welfare of the State of Florida by securing to the householder a home, so that the householder may live beyond the reach of financial misfortune. *See*

Public Health Trust v. Lopez, 531 So.2d 946, 948 (Fla. 1988).

Prior to the City's arrest of petitioner's floating home, Lozman had applied for – and been granted – homestead protection for his home. And even though he and the City became engaged in a dispute over dockage fees, such fees do not fall within any of the exemptions to Florida's homestead exemption. Yet, as a result of the district court's and then the Eleventh Circuit's determination that the structure was a vessel, and thus that the Federal Maritime Lien Act applied to this case, Florida's homestead protection was stripped away and the City was able to arrest, auction, and then destroy Lozman's residence in contravention of the Florida Constitution and fundamental state public policy.

b. *Tort law.* Federal maritime tort law governs torts involving "vessels" and differs from typical state tort law in several significant ways. First, nonpecuniary damages, as well as consequential damages in the absence of physical harm, are generally disallowed in personal-injury suits under maritime law, whereas they are recoverable under state law. *See, e.g., Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc); *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997). Second, the owner of a "vessel" owes a uniform duty of care to everyone lawfully on board his vessel, whereas some states impose different standards of care on landowners depending

on whether injured parties are visitors, business invitees, or licensees. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). Third, "admiralty tort plaintiffs can sue a vessel itself even when the owner has no liability." *Tagliere*, 445 F.3d at 1016. In state tort law cases, however, plaintiffs cannot sue structures involved in incidents. Fourth, admiralty defendants generally can limit their liability under The Limitation of Shipowners' Liability Act, 46 U.S.C. § 30505, to the value of the vessel and its contents, whereas defendants under state tort law are liable for the full amount of harm caused, plus any punitive damages assessed.

Some of these doctrines favor tort plaintiffs in admiralty cases, while others favor defendants. For instance, if a floating structure caught fire, the owner would be strictly liable to anyone lawfully on the structure who was injured, instead of only certain classes of individuals. But the owner would not be liable for any damages for pain or suffering, or indeed any damages at all beyond the value of the vessel and its contents.

The point is that all of these special admiralty rules have developed over the years to accommodate unique concerns of maritime navigation and commerce – that is, the "problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70 (1967). Thus, these distinctive rules often will be "worse suited" to

resolving tort cases involving indefinitely moored structures because accidents involving such structures have "nothing to do with the fact that [they are] afloat" rather than "sitting on dry land." *Tagliere*, 445 F.3d at 1013. In other words, applying maritime tort law to indefinitely moored floating structures, such as floating homes, casinos, and hotels, "encroaches on a regulatory domain that might well be thought to belong more properly to state courts and legislatures than to federal admiralty courts." *Id.* at 1015.

Worse yet, the Eleventh Circuit's rule that a floating structure's intended use is irrelevant to whether it constitutes a vessel conflicts with the general maritime law doctrine of unseaworthiness, which is maritime law's version of strict liability. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). This doctrine grants claimants an avenue for recovery for injuries when the "vessel, its gear, appurtenances, and operation" are not "reasonably safe." *Drachenberg v. Canal Barge Co.*, 571 F.2d 912, 918 (5th Cir. 1978). Whether those objects are "reasonably safe" turns on whether they are "reasonably suitable for [the vessel's] *intended use*." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. at 550 (emphasis added). Yet, when the structure at issue is not even intended to be used as a "vessel" at all, this test sensibly cannot be applied.

c. *Employment law.* Congress has enacted special statutory schemes to regulate employment aboard "vessels." In particular, the Jones Act, 46 U.S.C. § 30104, allows individuals who work on or

whose duties contribute to the function of "vessels" to sue for injuries sustained in the course of their employment. *See Stewart*, 543 U.S. at 487-88. The Longshore Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 903(2) & 904(b), similarly accommodates workers connected to maritime commerce, allowing land-based maritime workers who are injured working on "vessels" to recover scheduled workers' compensation on a no-fault basis. "The Jones Act was born from Congress' recognition of the greater perils of a life at sea and provides more extensive worker's compensation recovery for seamen than that available" under other applicable law. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). The same is true of the LHWCA. Yet the Eleventh Circuit's definition of "vessel" necessarily makes these favorable compensation regimes available to employees who have no connection whatsoever to "the greater perils of sea life," *i.e.* – individuals such as waitresses on floating restaurants and blackjack dealers on floating casinos. This Court should review the propriety of that definition before it alters such employment relationships in ways Congress never could have intended.

d. *Maritime safety laws.* "Vessels" are subject to federal safety statutes that impose certain duties and requirements upon their owners. For instance, the Federal Boat Safety Act (FBSA) grants the Coast Guard regulatory power over recreational "vessels." 46 U.S.C. § 4301. Through regulations implementing this Act, the Coast Guard requires the use of certain flotation devices; deployment of visual distress

signals; use of accident reporting procedures and compliance labeling; the construction of specified electrical and fuel systems; and much more. *Sprietsma v. Mercury Marine,* 537 U.S. 51, 59 (2002). Violations of the Act subject vessel owners to fines ($5,000 for a first offense, and up to $250,000 for multiple offenses) and sometimes to incarceration for up to one year. 46 U.S.C. § 4311. Once again, the need for federal law that preempts any inconsistent state regulation, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978), and the severity of these penalties stems from the critical need to promote safety while watercraft are in motion and away from land. But, the regulations seem quite unnecessary – if not outright overkill – for indefinitely moored structures owners have no intent of moving. This is especially so when the structure at issue (as the Eleventh Circuit conceded is the case here) "could never obtain a Coast Guard certification [for legal navigability] in the first place." Pet. App. 20a.

III. This Case Is An Ideal Vehicle For The Court To Resolve This Issue.

This case presents an ideal vehicle for this Court to resolve this split among the circuits over whether indefinitely moored floating structures are "vessels." While the Eleventh Circuit noted that the record here does not contain every factual detail concerning the history of the floating home at issue, all of the *relevant* facts are documented and undisputed. As the Eleventh Circuit itself put it, Lozman's home at the

time of the events in question "was moored to the dock by cables, received power from land, and had no motive power or steering of its own." Pet. App. 18a. Furthermore, Lozman intended to use the structure solely as a stationary residence, never to move across water again and certainly not to navigate. Yet, while these facts would unquestionably have precluded the structure from being deemed a vessel in the Fifth and Seventh Circuits (as well as in several lower courts), the Eleventh Circuit held that the structure was a "vessel" simply because – just like a wooden garage door that Justice Breyer observed at oral argument in *Stewart* certainly would not be a vessel, *see supra* at 9 – it was "capable of transportation over water by means of a tow." Pet. App. 21a. The actual "purpose for which the [structure] was constructed" did not matter "in any way" to the Eleventh Circuit. Pet. App. 19a.

Indeed, this last aspect of the Eleventh Circuit's decision shows why this case is an even better vehicle for resolving the lower courts' disagreement over how to read *Stewart* than would be a case involving a floating casino or restaurant. The structures at issue in most of those cases actually were constructed as boats and at the time of the lawsuits were merely moored to shore. Thus, it is possible, as occurred in the Seventh Circuit's *Tagliere* case, that the record in one of those cases might be fuzzy or disputed concerning whether the owner of the craft at issue truly "intends that the boat will never again sail." 445 F.3d at 1016; *see also Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa

2006) (moored gaming boat that moved two hundred hours per year was a vessel). There can be no such uncertainty in this case, however, because the home at issue was not designed ever to engage in maritime transportation and was incapable of being certified for legal navigability. This case, therefore, brings the conflict between the Eleventh Circuit and other courts into stark relief.

Finally, this case well illustrates the types of undesired and unjust consequences that are bound to occur under the Eleventh Circuit's overly expansive definition of "vessel." Here, the City used that definition to use an otherwise inapplicable federal law to oust a person from his home in contravention of a state's homestead protection laws.

IV. The Eleventh Circuit's Decision Is Incorrect.

The Eleventh Circuit's test for "vessel" status is unduly broad and improperly sweeps within its ambit floating structures that are indefinitely moored and connected to land-based utilities – especially when, as here, the structures were not even designed for waterborne navigation in the first place.

For over a century, "[t]he most basic criterion used to decide whether a structure is a vessel [has been] the purpose for which it is constructed and the business in which it is engaged." Thomas J. Schoenbaum, *What is a Vessel?*, 1 ADMIRALTY & MAR. LAW § 3-6 (2011); *see also Perry v. Haines*, 191 U.S.

17, 30 (1903) (the question whether a structure constitutes a "vessel" turns on "the purpose for which the craft was constructed, and the business in which it is engaged"). Accordingly, in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), this Court held that a floating wharfboat secured by cables to the shore and connected to onshore utilities was not a "vessel" because it was neither "taken from place to place" nor "used to carry freight from one place to another" or for any other purpose related to maritime commerce. Similarly, in *Roper v. United States,* 368 U.S. 20, 23 (1961), this Court held that a floating defunct cargo ship was not a "vessel" because it was being used as a "mobile warehouse" for grain storage and had "not been converted to any navigational use." *Id.* at 23; *see also Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 626-27 (1887) (floating drydock was not a "vessel" because it was "moored and lying at [the] usual place" it had occupied for years).

Under this purpose-based test, it is clear that floating structures that are indefinitely moored and connected to land-based utilities do not constitute "vessels." Not only are such structures not used for any kind of maritime transportation or commerce, but their owners have no design whatsoever to use them in this way in the future. Accordingly, there is nothing to be gained – and much to be lost – by regulating them under admiralty law.

The Eleventh Circuit, however, held here and in *Belle of Orleans*, 535 F.3d at 1311-12, that *Stewart*

expanded the longstanding test for "vessel" status to cover indefinitely moored floating structures. Relying on a sentence in *Stewart* stating that "a 'vessel' is any watercraft practically capable of maritime transportation, *regardless of its primary purpose* or state of transit at a particular moment," 543 U.S. at 497, the Eleventh Circuit has concluded that indefinitely moored structures are now "vessels" because "the status of 'vessel' does not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a (quoting *Belle of Orleans*, 535 F.3d at 1311).

The Eleventh Circuit is mistaken. The *Stewart* Court's mention of "primary purpose" was meant only to clarify that a structure can constitute a "vessel" even if it more often than not remains stationary. 543 U.S. at 495. Thus, even though the dredge in that case usually sat still and "was not in actual transit at the time" of the event at issue, it still was a "vessel" because "it *was*" sometimes "used to transport equipment and workers over water." *Id.* (emphasis in original) (internal quotation marks omitted). Nothing in this reasoning suggests that structures that are moored indefinitely to shore and were not created, and are *never* to be used in the future, for transport over water can now constitute vessels.

Lest there be any doubt, this Court in *Stewart* reaffirmed the *Evansville* and *Cope* decisions that such structures (even if formerly used for maritime transport) are not vessels. *Stewart*, 543 U.S. at 493. What is more, this Court expressly explained, citing

the Fifth Circuit's decision in *Pavone*, that ships formerly used for maritime transport are not vessels when they are "moored to the shore in a semi-permanent or indefinite manner," *id.* at 494 (quoting *Pavone*), even though there may be "a remote possibility that they may one day sail again." *Id.* This Court thus went out of its way to note that it was refusing to sweep within the reach of 1 U.S.C. § 3 "an array of fixed structures not commonly thought of as capable of being used for maritime transport." 543 U.S. at 494. That phrase describes perfectly the floating homes, restaurants, and other floating, indefinitely moored structures that the Eleventh Circuit has now deemed vessels.

It makes no difference, contrary to the Eleventh Circuit's analysis, *see* Pet. App. 21a, whether a floating structure may have been towed to reach its ultimate location or that it might be capable of being towed again. The wharfboat in *Evansville* did not qualify as a "vessel," even though each winter the structure was towed to a protected harbor to shield it from ice. *Evansville*, 271 U.S. at 22. The cargo ship in *Roper* likewise was not a "vessel," even though it was moved on occasions to an unloading facility. *Roper*, 368 U.S. at 23. In each of those cases, the facts that the structures were secured by cables to the mainland, connected to land-based utilities, and were not used for maritime purposes precluded them from being regulated as "vessels." The same is true here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-10695

D.C. Docket No. 9:09-cv-80594-WPD

THE CITY OF RIVIERA BEACH,

Plaintiff-Appellee,

versus

THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging in rem,

Defendant,

FANE LOZMAN,

Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 19, 2011)

Before EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

MARCUS, Circuit Judge.

Claimant-Appellant Fane Lozman appeals the district court's entry of an order of partial summary judgment and, following a two-day bench trial, an order of final judgment for Plaintiff-Appellee City of Riviera Beach ("City") in an *in rem* proceeding against Defendant Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length ("Defendant"). The City filed a complaint in admiralty against the Defendant, first, claiming that the Defendant committed the maritime tort of trespass, because the Defendant remained at the City marina after the City explicitly revoked its consent, and second, seeking to foreclose its maritime lien for necessaries (unpaid dockage provided to the Defendant by the City). On partial summary judgment, the district court concluded that it had admiralty jurisdiction over the Defendant because the Defendant was indeed a "vessel" under 1 U.S.C. § 3, and that the Defendant was liable for maritime trespass.[1] After a bench trial, the district court determined that the trespass gave rise to nominal damages of $1 and that

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* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

[1] On appeal, Lozman does not challenge the district court's trespass ruling (except to the extent that he claims the district court lacked jurisdiction in the first place).

the Defendant owed the City approximately $3,000 under the maritime lien. After thorough review, we **AFFIRM** the judgments of the district court in all respects.

I.

The relevant facts are these. Lozman purchased the Defendant vessel in 2002. After purchasing the Defendant, Lozman had it towed from a location near Fort Myers, Florida to North Beach Village, Florida, a distance of at least 200 miles. In North Bay Village, Lozman lived in the Defendant from the time of purchase until Hurricane Wilma struck in late 2005.[2] Lozman had the Defendant towed to the City marina in March 2006, where he continued to use the Defendant as his primary residence until its arrest in April 2009.

The City owns and operates a municipal marina on the Atlantic Intracoastal Waterway. The marina provides wet and dry storage for approximately 510 vessels, both commercial and recreational. The marina leases slips to vessels on both a monthly basis and at a higher daily transient rate. On March 10, 2006, Lozman and the City marina entered into a

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[2] According to Lozman, he moved the Defendant to two different marinas in North Bay Village after he was evicted from another marina for attempting to require that marina to provide reasonable accommodation – in the form of a wheelchair ramp – for his disabled houseboat neighbor.

"Wet-Slip or Dry Storage Agreement" (the "Agreement"). It called for Lozman to pay a monthly dockage fee of $1,174.48 by the first of each month, and dockage was provided on a month to month basis. It is undisputed that Lozman paid the entire monthly dockage fee for the month of March 2006, although he arrived at the marina some time in the middle of the month.

Conflict – indeed, litigious conflict – between the City and Lozman erupted shortly after Lozman's arrival. According to Lozman, on May 10, 2006, one day before then-Governor Jeb Bush signed an anti-eminent domain bill, the City entered into an agreement with a private developer for the redevelopment of the marina. Seeking to scuttle the redevelopment agreement, Lozman filed suit in Palm Beach County Circuit Court, alleging that the City's May 10, 2006 meeting with the developer violated the Florida Sunshine Law, Fla. Stat. § 286.011, because the public was only given one day's notice of the meeting. While it is not clear from the record how that lawsuit was resolved, the redevelopment plan was ultimately postponed or abandoned, a result for which Lozman takes credit.

On August 9, 2006, the City issued Lozman a notice of eviction from the marina, and subsequently filed an eviction suit also in the Circuit Court for Palm Beach County. The City's purported reasons for the eviction were that Lozman had failed to muzzle his ten-pound daschund and had used unlicensed repair persons to perform work on the Defendant. In

the eviction proceedings, the City argued on summary judgment that the Agreement between Lozman and the City established a nonresidential tenancy under Florida law. The Circuit Court agreed that the Agreement established a nonresidential tenancy under Florida law and was therefore governed by Florida's landlord-tenant statute. The court, however, denied the City's motion for summary judgment because Lozman had raised an issue of material fact as to whether the eviction was improper retaliation for his opposition to the redevelopment plan. On March 2, 2007, after a three-day trial, a jury returned a verdict in Lozman's favor, finding that Lozman's protected speech was a substantial or motivating factor in the City's attempt to terminate the lease, and that the attempted termination would not have occurred absent the protected speech. Lozman continued to pay the monthly dockage fee throughout the proceedings, and remained at the marina.

On June 14, 2007, a few months after Lozman's state court victory, the Riviera Beach City Council unanimously passed a resolution adopting a revised dockage agreement and accompanying Marina Rules & Regulations. The revised agreement and rules and regulations require all vessels docked at the marina and their owners to: (1) secure and maintain liability insurance to specified limits and name the marina as an additional insured; (2) show proof of valid registration or documentation; (3) be operational and capable of vacating the marina in case of an emergency; and (4) comply with the Florida Clean Vessel Act, Fla.

Stat. § 327.53, which, among other things, prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.

The City marina sent numerous letters to all marina residents and customers describing the new requirements. On or about July 25, 2007, the marina sent its initial notice of the new requirements and provided residents and customers with the revised dockage agreement to be executed by September 30, 2007. The marina sent customers an additional letter on November 13, 2007, further describing the new insurance requirements. On January 25, 2008, the marina sent Lozman a letter repeating the new insurance requirements and listing deficiencies in his and the Defendant's compliance with the marina's new rules and regulations. Specifically, the letter informed Lozman that he needed to sign a revised dockage agreement, that he lacked sufficient insurance coverage for the Defendant, and that he needed to provide insurance and registration documentation to the marina. Two months later, the marina performed an assessment of the vessels' compliance with the City resolution, and determined that seventeen vessels docked at the marina, including the Defendant, were not in compliance.[3] On April 22, 2008, the marina

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[3] Of the seventeen vessels that were not in compliance as of the March 2008 assessment, some later came into compliance or vacated the marina; others were abandoned by their owners; and others were donated to charity and removed from the marina. The Defendant was the only noncompliant craft as of April 1, 2009.

sent Lozman a letter informing him that he had missed the deadline to execute a new agreement and procedures to enforce the City's rights would be implemented against the Defendant.

Lozman claims that he never received these letters. He does not dispute, however, that he received a letter from the marina dated March 6, 2009, which provided final notice of the marina's revocation of permission for the Defendant to remain at the marina unless (1) Lozman brought the Defendant into compliance with the City resolution's new requirements, (2) Lozman paid the outstanding balance on the account, and (3) Lozman executed the revised dockage agreement. The letter stated that "[s]hould your vessel remain and you fail to pay your account in full, execute the 'Marina Dockage Agreement,' and otherwise bring your vessel into compliance with the Agreement's provisions by **April 1, 2009**, the City will promptly institute legal proceedings against you and your vessel for trespass and to foreclose the City's lien on your vessel." It is undisputed that Lozman never executed the new agreement and that the Defendant remained at the marina after April 1, 2009.

Accordingly, on April 20, 2009, the City filed a two-count verified complaint in admiralty against the Defendant to foreclose its maritime liens for "necessaries" (dockage provided by the City marina to the Defendant), under 46 U.S.C. § 31342,[4] and for

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[4] 46 U.S.C. § 31342 provides:

(Continued on following page)

trespass. The United States District Court for the Southern District of Florida issued a warrant for the arrest of the Defendant under Supplemental Rule C for Certain Maritime and Admiralty Claims, which provides, in relevant part, that "[i]f the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action." Fed. R. Civ. P. Supp. Rule C(3)(a)(i). On the afternoon of April 20, 2009, the United States Marshal arrested the Defendant, and had it towed from the City marina to Miami, Florida, a distance of approximately eighty miles. The next day, Lozman filed, pro se,[5] an emergency motion to dismiss the complaint and return the Defendant to the marina. After a hearing on April 23, 2009, the district court denied Lozman's motion.

On August 12, 2009, the City moved for partial summary judgment on its maritime trespass claim. After considering Lozman's response, the district court

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(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

[5] Lozman proceeded pro se for the entirety of the case below, including the bench trial. He now has representation on appeal.

granted the City's motion, finding that the Defendant was a "vessel" for purposes of federal admiralty jurisdiction. The district court also found that the Defendant was trespassing on the marina as of April 1, 2009. Lozman had received notice of the Defendant's failure to comply with the marina rules and regulations in early March 2009, and the notice expressly terminated the City's consent as of April 1, 2009. The Defendant, however, remained at the marina until its arrest on April 20, 2009. The district court concluded that the Defendant vessel remained at the marina after the City terminated consent.

On November 23 and 24, 2009, the district court held a two-day bench trial on the issues of damages for the trespass claim, and liability and damages for the maritime lien for necessaries claim. On January 6, 2010, the district court entered its findings of fact and conclusions of law, and issued an order of final judgment in the City's favor. The district court found that the Defendant's account was delinquent as of April 20, 2009 in the amount of $3,039.88. The court credited the City marina's ledger and the testimony of the City's forensic accountant in determining the amount owed. The court found no real harm resulting from the trespass, awarding the City nominal damages of $1.

On February 25, 2010, the entry of final judgment was amended to include $3,053.26 in prejudgment interest plus custodial fees. The district court also ordered the U.S. Marshal to release the Defendant and execute its sale in satisfaction of the

judgment. Lozman filed an emergency motion to stay the sale and to stay enforcement of the district court's final judgment in this Court, which was denied on March 3, 2010. The City purchased the Defendant in a Bill of Sale executed on March 4, 2010. This timely appeal of both the district court's partial summary judgment and final judgment orders followed.

II.

The standard of review for a district court's grant of summary judgment is well settled. "This court reviews a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court." *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1234 (11th Cir. 2010). "Summary judgment is appropriate where, viewing the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party, there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). As for the district court's entry of final judgment after a bench trial, "[w]e review a district court's factual findings when sitting without a jury in admiralty under the clearly erroneous standard. We review the district court's conclusions of law de novo." *Sea Byte, Inc. v. Hudson Marine Mgmt. Servs., Inc.*, 565 F.3d 1293, 1298 (11th Cir. 2009) (quoting *Venus Lines Agency, Inc. v. CVG Int'l Am., Inc.*, 234 F.3d 1225, 1228 (11th Cir. 2000)). "A finding of fact is clearly erroneous when the entirety of the evidence

leads the reviewing court to a definite and firm conviction that a mistake has been committed." *Id.* (quoting *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1380 (11th Cir. 2006)).

Lozman first claims that the district court incorrectly concluded on summary judgment that the Defendant was a "vessel" subject to federal admiralty jurisdiction. He further says that the City did not have a maritime lien because the Defendant did not owe the City money for dockage, but rather the City owed Lozman. Lozman also asserts that the City improperly instituted this admiralty action in retaliation against him for the exercise of his First Amendment rights in opposing the City's development plan for its marina, and that the district court erred in finding that Lozman had failed to establish such a defense. Finally, Lozman argues that his March 2007 success in resisting an eviction attempt by the City in state court precludes the City, under the doctrines of judicial and collateral estoppel, from bringing a federal maritime claim against him in May 2009, and that the district court erred in declining to apply either estoppel doctrine. We consider each claim in turn.

A.

The United States Constitution extends the judicial power of the United States "to all Cases of admiralty or maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. Under that clause, Congress has granted

federal district courts exclusive original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1). This is an *in rem* case against the Defendant for the maritime tort of trespass and for the enforcement of a maritime lien for necessaries. A "mandatory prerequisite" to the district court's admiralty jurisdiction over the Defendant, and to the attachment of a maritime lien, is that the Defendant be a "vessel" under federal law.[6] *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010). We review the district court's conclusion that the Defendant was a "vessel" de novo. *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922 (11th Cir. 2001).

The determination of whether the Defendant is a "vessel" is dictated by binding precedent. Both this Court and the former Fifth Circuit in binding

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[6] Lozman spends considerable ink describing Florida state law and the difference under Florida law between a "floating residential structure" and a "vessel." Lozman claims that the Defendant is a "floating residential structure," not a "vessel," as the terms are defined under Florida law. These arguments miss the point. Federal law governs the existence of admiralty jurisdiction, and the term "vessel" is specifically defined in the United States Code. Accordingly, for purposes of federal admiralty jurisdiction, any differences among the definitions of vessel under the laws of various states or between state and federal law must yield to the federal definition and the required uniformity of federal maritime law. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490 (2005) ("[1 U.S.C.] § 3 continues to supply the default definition of 'vessel' throughout the U.S. Code. . . ."); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917).

precedent have employed a broad definition of vessel pursuant to 1 U.S.C. § 3. Section 3 provides, in full: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). We have unambiguously said that the primary inquiry in determining whether a craft is a vessel is whether the craft was "rendered practically incapable of transportation or movement." *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008) (quoting *Stewart*, 543 U.S. at 494). In so doing, we have echoed the Supreme Court's pronouncement in *Stewart*, 543 U.S. 481, that the determination of whether a craft is a "vessel" focuses on "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496. We therefore look at the capability of the craft, "not its present use or station." *Belle of Orleans*, 535 F.3d at 1310.

Our cases provide further context for this broad definition. In *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955), the Carol Ann, a salvage and repair vessel built for the Navy, had been declared surplus and was subsequently sold and re-sold to private parties. *Id.* at 622. One of the vessel's owners decided to scrap the vessel, and at the time the vessel was brought in for certain repairs, she was in the following condition: "her propellers and propeller shafts had been removed; she had no crew; none of her machinery was in operation; she had no light,

heat, or power in operation; her main engines had been completely removed; all of her steering apparatus, with the exception of the rudder, had been removed and sold; her superstructure and masts were intact; her navigation lights were in place, though not operable; [and] her compartmentation, including cargo holds, was intact." *Id.* at 622-23. After these repairs were performed, the Carol Ann was moored to a dock by cables, and she received telephone and electrical service through connections to sources on land. *Id.* at 623. Although the Carol Ann was almost completely gutted, except for her superstructure, the former Fifth Circuit[7] held that she was a vessel. *Id.* The Court, as it had done in the past, "saw fit to emphasize the words 'capable of being used' in discussing Section 3 of Title 1." *Id.* The Carol Ann was afloat and capable of being towed, had a deck, cabins, and superstructure, and therefore "was capable of being used as a means of transportation under tow" despite having "no steering mechanism" and "no motive power of its own." *Id.*

The case of *Miami River Boat Yard, Inc. v. 60' Houseboat*, Serial No. SC-40-2860-3-62, 390 F.2d 596 (5th Cir. 1968) is equally instructive. There, a panel of the former Fifth Circuit concluded that a houseboat with no motive power of her own that was used as a

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[7] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

residence in a marina was still a vessel. *Id.* at 597. The undisputed facts showed that the defendant houseboat had "made the rather considerable maritime voyage to libelant's shipyard in Miami . . . with the expectation that she would be towed away." *Id.* The Court noted that a houseboat "affords a waterborne place to live with the added advantage of at least some maritime mobility." *Id.* Accordingly, "[t]hat she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel." *Id.*

More recently, in 2008, we had occasion in *Belle of Orleans* to consider whether a riverboat casino that was moored to a dock by steel cables and had electrical, computer, and phone cables attached to a shore side source was a vessel. 535 F.3d at 1304. We held that it was. A panel of this Court reaffirmed that *Pleason* was still good law and that it "addressed precisely the legal issue we face in the instant case." *Id.* at 1306. We also found the riverboat at issue to be factually indistinguishable from the vessel in *Pleason*, with the exception that the riverboat had a working engine and other machinery and therefore motive power of its own. *Id.* at 1307. That distinction, of course, led us further toward the conclusion that the riverboat was capable of maritime transport and was, therefore, a vessel, but we did not depart from the *Pleason* analysis. *Id.*

We distinguished both legally and factually the Fifth Circuit's opinion in *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), on

which Lozman now relies, where the court held that a floating casino that was semi-permanently and indefinitely moored to the shore was not a vessel because it was "removed from navigation" and "was constructed to be used primarily as a work platform." *Id.* at 570. We rejected the reasoning of the Fifth and Seventh[8] Circuits, both of which "focus on the intent of the shipowner rather than whether the boat has been 'rendered practically incapable of transportation or movement.'" *Belle of Orleans*, 535 F.3d at 1311 (quoting *Stewart*, 543 U.S. at 494). Again we observed that "[t]he owner's intentions with regard to a boat are analogous to the boat's 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose." *Id.* at 1311 (citing *Stewart*, 543 U.S. at 497 ("Under [1 U.S.C.] § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose. . . .") (footnote omitted)). Moreover, we noted that "such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction," *id.* (citing *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th Cir. 2004)), because "state law can change" and "an owner's intentions may change in ways never anticipated," *id.* at 1311-12.

A panel of this Court reiterated the analysis employed in *Belle of Orleans* and the enduring vitality of

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[8] *See Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006).

Pleason and *60' Houseboat* still again in *Crimson Yachts*, 603 F.3d 864. After reviewing the purpose and history of maritime liens and prior precedent interpreting the term "vessel," the Court noted that a "case-by-case approach is often necessary to determine whether admiralty jurisdiction applies to novel or unusual situations." *Id.* at 875 (internal quotation marks omitted). We ultimately held that the Betty Lyn II, a yacht that had been drydocked, removed from the water with cranes, and temporarily disabled for extensive repairs, was still a vessel. *Id.* We stated that "[t]he BETTY LYN II need merely be capable of transportation on water to be a vessel. The law does not require that she be able to self-propel." *Id.* (citing *Belle of Orleans*, 535 F.3d at 1307; *60' Houseboat*, 390 F.2d at 597). Although the yacht was on dry land for repairs, it retained the status of vessel because it still "could be towed upon 24 hours notice." *Id.*

Lozman's efforts to distinguish *Pleason* and the line of precedent that followed are unavailing. Aside from his discussion of Florida law, which is of no moment in defining the term "vessel" for purposes of federal admiralty jurisdiction, Lozman raises three somewhat interrelated arguments in an effort to avoid controlling precedent. First, he argues that the Defendant was *not* practically capable of transportation over water, even by tow. The record disputes Lozman's characterization. The Defendant in this case is virtually indistinguishable from the vessels in the aforementioned cases in terms of its capacity for maritime transport. Like the vessel in *Pleason*, the

Defendant was moored to a dock by cables, received power from land, and had no motive power or steering of its own. Moreover, the Defendant *was* towed several times over considerable distances: first, from the place of purchase near Fort Myers to North Bay Village; next, among several marinas in North Bay Village; then, from North Bay Village down to the City; and finally, after its arrest, from the City to Miami.

Lozman claims, nevertheless, without any evidentiary support in the record, that each of the three times the Defendant was moved over 250 feet it sustained serious damage and that it would have sunk two out of the three times if immediate underwater repairs had not been performed. But absent a shred of evidence, and in light of the contradictory evidence of the actual voyages made by the Defendant under tow, this assertion alone cannot preclude a determination that the Defendant was practically capable of maritime transportation. In addition, as the district court recognized, in *Belle of Orleans*, the claimant raised a similar concern that moving the vessel would damage it, and we stated that "the BELLE OF ORLEANS was capable of moving over water, *albeit to her detriment*, and was capable of being transported under tow. As such, we hold that the BELLE OF ORLEANS is a 'vessel' for purposes of admiralty jurisdiction." 535 F.3d at 1312 (emphasis added).

Second, Lozman argues, again without any record support, that the Defendant was constructed using methods and materials appropriate for houses

on land and, accordingly, that the Defendant is not a vessel. Thus, Lozman asserts that the Defendant is a "floating shack, built out of plywood with only 1/16" of fiberglass surrounding its unraked hull, without proper cleats for towing,[9] no bilge pumps, no navigation aids, no lifeboats and other lifesaving equipment, no propulsion, [and] no steering." In essence, Lozman claims that the Defendant "was designed as a residence that just happened to float." But the Defendant's design, however unusual or unorthodox, is of little moment. We clearly stated in *Belle of Orleans* that the status of "vessel" does not depend in any way on either the purpose for which the craft was constructed or its intended use. 535 F.3d at 1311.

Lozman also uses these claims about the Defendant's construction to again suggest that the Defendant was not practically capable of moving over water, even by tow. But that argument, too, is contradicted by the record. The fact that the Defendant was an unusually designed craft is relevant only to the extent that the design prevents it from having any practical capacity for transportation over water, and the record is clear that the Defendant had this practical capacity. *See Burks v. Am. River Transp. Co.*, 679

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[9] Lozman's own brief and the evidence presented at trial appear to contradict this point. Before he even arrived in the City, and thus before the attachment of a maritime lien and the district court's exercise of its admiralty jurisdiction over the Defendant, Lozman had a repairperson fit the Defendant with four towing bitts prior to its approximately-seventy mile tow from North Bay Village to the City marina.

F.2d 69, 75 (5th Cir. Unit A 1982) ("No doubt the three men in a tub would also fit within our definition [of "vessel"], and one probably could make a convincing case for Jonah inside the whale."); *McCarthy v. The Bark Peking*, 716 F.2d 130, 134 (2d Cir. 1983) ("[V]irtually any capacity for use as seagoing transportation – perhaps even the hypothetically plausible possibility has sufficed to lend the dignity of 'vessel' status to a host of seemingly unlikely craft.").

Finally, Lozman argues that the Defendant did not have a Hull Identification Number ("HIN") and could not obtain Coast Guard certification, both of which are required for legal navigability, and that therefore it cannot be considered a vessel. This argument misapprehends the relevant inquiry. As we recognized in *Belle of Orleans*, legal navigability is not the test for vessel status. 535 F.3d at 1311-12 ("[I]f legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel. . . . Such a result is clearly not what the Supreme Court intended [in *Stewart*]."). Lozman claims the Defendant is distinguishable from the hypothetical vessel in *Belle of Orleans* because the Defendant could never obtain a Coast Guard certification in the first place. But in distinguishing this Court's hypothetical illustration of a principle, he fails to dispute – nor could he dispute – the principle itself; namely, that we do not consider legal navigability at all in determining whether a craft is a vessel, but rather only the craft's practical capacity for maritime transport.

In short, based on long precedent, the Defendant is a "vessel" under 1 U.S.C. § 3. Like the vessels in *Pleason* and *60' Houseboat*, the Defendant was practically capable of transportation over water by means of a tow, despite having no motive or steering power of its own. The district court did not err in concluding that it had federal admiralty jurisdiction over the Defendant.

B.

Under 46 U.S.C. § 31342, a "person providing necessaries to a vessel" has a maritime lien on the vessel that may be enforced by means of an *in rem* civil action against the vessel. 46 U.S.C. § 31342(a). We have held that dockage, which was undisputedly provided by the City marina to the Defendant, constitutes "necessaries" for purposes of maritime law. *Belle of Orleans*, 535 F.3d at 1314 (citing *Inbesa Am., Inc. v. M/V Anglia*, 134 F.3d 1035, 1037-38 (11th Cir. 1998)).

Lozman does not dispute the legal standard for a maritime lien, but rather argues that the City has failed to prove that a maritime lien accrued in this case because he allegedly did not owe any money to the marina. The proper balance of Lozman's dockage account with the marina is a question of fact and was the primary issue in the two-day bench trial before the district court. Accordingly, we review the district court's factual determinations for clear error. *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1211 (11th Cir. 2010). A "court will not disturb a district court's

findings of fact under the clearly erroneous standard unless it is left 'with the definite and firm conviction that a mistake has been made' after making all credibility choices in favor of the fact-finder's choice, in light of the record as a whole." *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1481 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (per curiam) (quoting *Maddox v. Claytor*, 764 F.2d 1539, 1545 (11th Cir. 1985)). An appellate court may not reverse a district court's finding that is plausible in light of the entire record even if "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Based primarily on the marina's records and the in-court testimony of marina director Edwin Legue, forensic accountant Glenn Troast, and Lozman himself, the district court found that Lozman owed the marina "$805.78 for unpaid dockage" and "$608.60 for unpaid late fees" as of March 31, 2009, and "$1624.50 in dockage at the transient rate for [the] period from April 2, 2009 to April 20, 2009, inclusive," for a total of $3,038.88.

Lozman makes several arguments in response, all of which invite us to reconsider the well-grounded factual findings of the district court. First, Lozman claims that one of his checks was not properly credited to his account. Second, Lozman asserts that he was erroneously charged late fees. Third, Lozman contends that he is entitled to a prorated dockage fee

for the month of March 2006, because he paid for the full month but did not dock the Defendant at the marina until on or around March 17. Finally, Lozman claims that the marina owes him a credit for fifteen months of spotty or non-existent electrical service. We consider each claim in turn.

First, Lozman says that his September 2008 dockage fee check, #1157, was cashed by the City but was not properly credited to his account. As evidence, Lozman claims that his marina billing statement dated April 1, 2009, did not show a credit for this check. But the district court did not rely on the April 1, 2009 billing statement in computing the amount owed. Instead, the evidence upon which the district court relied was the marina's ledger card for Lozman's account, and the testimony of the City's forensic accountant, Glenn Troast, which was based on a review of that ledger. And the ledger has an entry for the amount of check #1157 on the date it was sent, September 9, 2008. The district court therefore found that check #1157, in addition to the other checks Lozman claimed were not properly credited to his account, were properly accounted for in the ledger.

Lozman further claims that the marina accounting staff intentionally held three of his checks for up to three months before depositing them. Presumably, Lozman is suggesting that the City's actions led him to unfairly incur late fees. At trial, however, forensic accountant Troast testified that Lozman was credited for any late fees that were assessed against him while those checks were being held. Indeed, the

ledger shows that, on July 9, 2008, shortly after the City deposited the three checks in question, Lozman's account was credited $473.11 for past late fees.[10] At all events, we can find no clear error in the district court's factfinding.

Lozman's next claim is that he is entitled to a prorated dockage fee for March 2006, his first month at the marina. It is undisputed that Lozman paid the monthly fee in full and that he arrived at the marina on or around March 17, 2006. But those two undisputed facts alone do not lead to the conclusion that Lozman was entitled to pay a prorated dockage fee. Nothing in the Agreement itself addresses the issue of prorated monthly payments, and nothing in the record suggests that Lozman ever demanded a credit or proration of his March 2006 payment before this case began. Without more, the district court did not commit clear error by declining to find that the City owed Lozman a prorated portion of his March 2006 dockage fee.

Finally, Lozman asserts that he was owed "15 months electric, $750.00, for one outlet he paid for that never worked and that he did not use." Although Lozman claims that his electricity did not work for two years, the record lacks any evidence – not even a

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[10] Lozman also received substantial credits on other occasions. Thus, for example, the forensic accountant testified at trial that, in August 2007, the marina forgave a full month of unpaid dockage fees for July 2007, effectively crediting Lozman's account the unpaid amount.

single electrical bill – to support this claim. In addition, it is undisputed that the City credited Lozman $450 for nine months of electrical service on July 9, 2008, because of alleged service interruptions.

At the end of the day, nothing in the record indicates that we may second-guess the district court's weighing of the evidence. We are not persuaded that the district court erred in its factfinding, and neither are we left, therefore, "with the definite and firm conviction that a mistake has been made." *Maddox*, 764 F.2d at 1545. The district court's factual findings regarding the amount Lozman owed under the City's maritime lien for necessaries were not clearly erroneous.

C.

Lozman claims next that the City's federal admiralty complaint against the Defendant "was simply part of an ongoing retaliation by the CITY against LOZMAN for his success (with the support of then Governor Bush and then Attorney General Crist) in stopping the CITY from using eminent domain to take thousands of homes and businesses, along with the CITY marina, to be given to a private developer in a 2.4 billion dollar redevelopment deal," as well as for his success in the state court eviction case.

In order to successfully advance a First Amendment retaliation defense, Lozman must show (1) that his conduct was constitutionally protected; and (2) that his conduct "was a substantial or motivating factor

in" the City's decision to arrest the Defendant. *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1125 (S.D. Fla. 1991) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also Gattis v. Brice*, 136 F.3d 724, 726 (11th Cir. 1998) ("To succeed in a section 1983 suit based on a claim of retaliation for speech, the plaintiff must show that his speech was a substantial or motivating factor in the allegedly retaliatory decision." (internal quotation marks omitted)). If Lozman makes this showing, the burden then shifts to the City to show "by a preponderance of the evidence" that the action against the Defendant would have occurred "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287; *see also Cuban Museum*, 766 F. Supp. at 1125.

The district court concluded on summary judgment that Lozman had failed to show that his 2006 opposition to the marina redevelopment plan was a substantial or motivating factor in the City's decision to bring this case. The court, therefore, did not reach the question of whether Lozman's conduct was constitutionally protected or whether the City could show by a preponderance of the evidence that the arrest of the Defendant would have occurred even in the absence of Lozman's conduct. The district court noted that, while the timing of the City resolution mandating compliance with revised marina rules and regulations – which occurred three months after Lozman's victory in the state court eviction case – was "enough to raise eyebrows," it was still not enough, absent *any*

firm evidence, to show that Lozman's speech was a substantial or motivating factor in the City's decision to implement those rules and to arrest the Defendant. The district court further found that the evidence submitted by Lozman – much of which was inadmissible, and which consisted primarily of (1) the minutes from a City Council meeting held approximately one year before the decision to change the rules was made, and (2) newspaper articles asserting that the rules changes were effectuated as a personal vendetta against Lozman – suggested at most an ongoing feud between Lozman and the City, but did "not establish a connection between Mr. Lozman's protected conduct and the specific action at issue here: the changing of the marina rules and their enforcement against the Defendant vessel."

The district court's conclusions were sound. On appeal, Lozman argues that what "is enough to raise eyebrows" – here, the timing of the rules changes – is circumstantial evidence sufficient to preclude summary judgment. We are unpersuaded. It is certainly true that "[w]here the circumstantial evidence and reasonable inferences drawn therefrom create a genuine issue of material fact for trial, summary judgment is improper." *Chapman v. Am. Cyanamid Corp.*, 861 F.2d 1515, 1518-19 (11th Cir. 1988). "However, an inference based on speculation and conjecture is not reasonable." *Id.* at 1518. As noted by the City, "circumstantial evidence must do more than simply 'raise some eyebrows'; it must be sufficient to raise a jury question." Lozman has presented no evidence in the

record to support his retaliation claims beyond the timing of the rules changes. And that timing is hardly enough to raise a *genuine* issue of material fact.

Indeed, the evidence that is in the record overwhelmingly contradicts Lozman's claims. To begin with, the new marina rules did not apply solely to the Defendant. Rather, the Defendant was one of seventeen vessels that were not in compliance with the new rules, and, on April 1, 2009, was the only non-compliant vessel remaining at the marina. Thus, there is no evidence to suggest that the Defendant was specifically targeted. The City's stated goals behind the revisions to the marina rules were "to become more fully compliant with state and federal laws and to better insulate the City from financial loss and liability exposure." Lozman marshals no evidence to dispute any of this.

Perhaps most significantly, the causal link between the March 2, 2007 state court eviction verdict in Lozman's favor and the June 20, 2007 rules changes is highly attenuated, if not wholly implausible. Notably, between those two events there was a new City Council election, which completely changed the composition of the City Council. As Lozman himself testified at the bench trial: "[T]he elections in Riviera Beach are in March. So the March, 2007, election all new people came in. And the feeling around town was they came in – that my win and the eminent domain defeat had a lot to do with it." Indeed, Lozman supported the campaigns of two of the new council members elected in 2007, who then

turned around and signed the *unanimous* City Council resolution authorizing the marina's new rules and regulations.

The district court did not err in granting summary judgment to the City on Lozman's affirmative defense of retaliation. Like the district court, we need not reach the questions of whether Lozman's speech was constitutionally protected and whether the City's rules changes and arrest of the Defendant would have occurred in the absence of Lozman's speech.

III.

Lozman's final argument is that the City was judicially estopped from bringing a federal maritime claim against the Defendant in light of the City's argument in state court that Lozman's dockage agreement with the marina gave rise to a nonresidential tenancy subject to Florida law. Lozman's argument is without merit. Judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent pleadings." *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991). While judicial estoppel "cannot be reduced to a precise formula or test," *Zedner v. United States*, 547 U.S. 489, 504 (2006), three factors typically inform the inquiry: (1) whether there is a clear inconsistency between the earlier position and the later position; (2) a party's success in convincing a court of the earlier position, so that judicial acceptance of the inconsistent later position would create the perception

that either the earlier or later court was misled; and (3) whether the inconsistent later position would unfairly prejudice the opposing party if not estopped. *Jaffe v. Bank of Am., N.A.*, 395 F. App'x 583, 587 (11th Cir. 2010) (per curiam) (unpublished); *see also Zedner*, 547 U.S. at 504.

The first factor is crucial; without inconsistency there is no basis for judicial estoppel and no reason even to reach the other two factors. *See Zedner*, 547 U.S. at 506. Lozman does not even begin to show how there could be a "clear inconsistency" between the City's earlier position that a dockage agreement between *him* and the City is governed by state landlord-tenant law and the City's current position that the *Defendant* is a vessel subject to federal admiralty jurisdiction. Because there is no clear inconsistency here, the district court correctly concluded that the City was not estopped from bringing its action in admiralty against the Defendant.

Lozman makes a second estoppel argument, which is equally unpersuasive. Specifically, Lozman asserts that, because the state court ruled that the City's 2006 eviction attempt was improper retaliation, under the doctrine of collateral estoppel, the district court was required to rule that the City's admiralty action was also improper retaliation against him for the exercise of his First Amendment rights. An element of collateral estoppel is that "the issue at stake must be identical to the one alleged in the prior

litigation." *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985).[11] Moreover, "[t]he application of collateral estoppel is committed to the sound discretion of the district court," *id.*, and, accordingly, we review the district court's decision whether or not to apply collateral estoppel for abuse of discretion. *Dailide v. U.S. Att'y Gen.*, 387 F.3d 1335, 1341 (11th Cir. 2004).

The district court could not have abused its discretion in declining to apply collateral estoppel, because the issues at stake here are significantly different from those in dispute in the state court proceeding. In this case, the issues before the district court were whether the Defendant was a vessel, whether the Defendant was trespassing, and whether the City held a maritime lien for necessaries on the Defendant (and the amount owed under that lien). None of these issues were previously litigated. Lozman contends that the "identical" issue at stake is whether the City retaliated against him "for the exercise of his First Amendment rights, which issue was resolved in his favor in the state court action." But this statement of the issue is misleading. The

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[11] "There are several prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action." *Greenblatt*, 763 F.2d at 1360 (citing *DeWeese v. Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982)).

factual predicate for the retaliation claim, as we have discussed, has wholly changed since the 2007 state court verdict in Lozman's favor. There is a new City Council, which passed a unanimous resolution revising the marina rules and regulations, and this is an *in rem* action against the Defendant based in large part on Lozman's failure to comply with those rules and regulations (and on Lozman's failure to pay dockage fees). The City's earlier 2006 eviction attempt – the purported reasons for which were Lozman's failure to muzzle his small dog and his use of unapproved repairpersons – is not identical or even similar – factually or legally – to the City's 2009 admiralty action. The district court was not required to give any credence to the state court proceedings in this case, and did not abuse its discretion in declining to apply collateral estoppel.

The district court's orders of partial summary judgment and final judgment in favor of the City are **AFFIRMED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CITY OF RIVIERA BEACH,

Plaintiff,

vs.

That certain unnamed gray, two story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment, and all other necessaries, appertaining and belonging in rem,

Defendant. /

CASE NO. 09-80594-CIV-DIMITROULEAS

Magistrate Judge Snow

IN ADMIRALTY

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Nov. 19, 2009)

THIS CAUSE is before the Court upon the Plaintiff City of Riviera Beach's Motion for Partial Summary Judgment [DE 80], filed on August 21, 2009. The Court has carefully considered the Motion, the Claimant Fane Lozman's Response to Plaintiff's Corrected Motion Dated August 21, 2009 for Partial Summary Judgment [DE 110], the Plaintiff's Reply to Claimant's Response [DE 117], the parties' affidavits and exhibits, and is otherwise fully advised in the premises.

I. BACKGROUND

The City of Riviera Beach and the Claimant Fane Lozman have been a protracted struggle concerning the City's development plans. In this battle there have been allegations of corruption, several lawsuits between the two, and arrests, among other incidents. Rather than delve into the full details of the parties' history against each other, we describe below the relevant facts to the instant action.

Plaintiff City of Riviera Beach ("City") holds title to and manages a Riviera Beach municipal marina in trust for the public. In this capacity, the City leases slips for vessels, and what the Plaintiff contends are floating structures rather than vessels. Mr. Lozman and the City executed an agreement on March 10, 2006 for Mr. Lozman to store his floating structure at a slip in the marina. In August, 2006, the City attempted to terminate the agreement with the Mr. Lozman. The City initiated an eviction proceeding against Mr. Lozman in state court (Case No. 50 2006 CA 014054, in the Fifteenth Judicial Circuit in and for Palm Beach County). On March 23, 2007, Mr. Lozman prevailed against the City, and consequently kept his structure at the marina and continued to pay the dockage fees. Specifically, the jury found that the City had attempted to terminate Mr. Lozman's lease for his exercise of his constitutionally-protected rights.

The Riviera Beach City Council passed a resolution in June, 2007, in which the City adopted a new dockage agreement and new Marina Rules &

Regulations. The new rules required vessels docked at the marina to: have insurance with the marina as an additional insured, have proof of registration, be capable of vacating in an emergency, and be compliant with the Florida Clean Vessel Act. The City claims to have sent numerous letters to Mr. Lozman between July 2007 and January 2009 regarding the new rules; Mr. Lozman asserts that he never received them. On or about March 10, 2009, Mr. Lozman received a letter from the City about Mr. Lozman's failure to execute the new dockage agreement, comply with the new rules, and pay certain charges on his account. The letter stated that if the Defendant floating structure did not come into compliance by April 1, 2009, the City would institute trespass proceedings against the vessel. In early April, 2009, Mr. Lozman attempted to pay the dockage fee by check. Although this attempt was initially credited to his account with the marina on April 6, 2009, it was reversed the same day. On April 17, 2009, the City returned Mr. Lozman's check with a letter notifying him that no further payments would be accepted from him on the account. On April 20, 2009, the City filed a Verified Complaint against the Defendant floating structure. [DE 1]. At the same time, the City moved for the issuance of an arrest warrant. The Court issued the warrant [DE 6], and the Defendant was towed out of the marina and into custody of National Maritime Services, Inc.

The City's Verified Complaint has two counts. Count I is for "Enforcement of a Maritime Lien –

Necessaries", in which the City seeks to collect the amount it claims was due on the Defendant's account along with the value of dockage between April 1, 2009, and April 20, 2009, fees and costs. Count II is for Enforcement of "Maritime Lien – Maritime Trespass", in which the City claims it has a maritime lien for damages from Mr. Lozman's failure to remove the Defendant from the marina by April 1, 2009. In this Motion for Partial Summary Judgment [DE 80], the City seeks summary judgment only on liability for Count II of the Verified Complaint.

II. Discussion

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita,* 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson,* 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not

lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. Subject Matter Jurisdiction

As a preliminary matter, Mr. Lozman contends that this Court does not have jurisdiction over this case because his floating residential structure is not a vessel subject to jurisdiction in federal courts. Mr. Lozman also argues that the City is estopped from arguing that his floating structure is a vessel. The City argues that the Defendant is a vessel, and that estoppel does not apply.

1. Estoppel Does Not Apply

Mr. Lozman argues that the City should be "legally and equitably estopped" from arguing that this Court has subject matter jurisdiction. To support this contention, Mr. Lozman submits that the City argued in state court proceedings that Mr. Lozman was a nonresidential tenant at the marina and therefore subject to certain Florida state laws. The circuit court agreed that Mr. Lozman was a nonresidential tenant (though Mr. Lozman ultimately prevailed on other grounds).

Judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent

pleadings." *McKinnon v. Blue Cross & Blue Shield,* 935 F.2d 1187, 1192 (11th Cir. 1991) (quoting *Am. Nat'l Bank v. Fed. Dep. Ins. Corp.,* 710 F.2d 1528, 1536 (11th Cir. 1983)). Judicial estoppel is an equitable doctrine that "cannot be reduced to a precise formula or test". *Zedner v. United States,* 547 U.S. 489, 504 (2006). The Supreme Court has given three factors that typically inform a court's judicial estoppel inquiry: clear inconsistency between the earlier position and the later position; a party's success in convincing a court of the previous position; and whether the inconsistent position would unfairly prejudice the opposing party. *Id.*

We find that Mr. Lozman's arguments for estoppel are misplaced. Mr. Lozman has not shown a clear inconsistency between the City's previous position that Mr. Lozman falls under Florida law for nonresidential tenancy at the marina, and their current position that the Defendant floating structure is a vessel under federal law. Mr. Lozman has neither argued that the definitions under state law are identical to that under federal law, nor that the City has made such an argument. Since we find no clear inconsistency, we find that judicial estoppel should not apply.[1]

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[1] To the extent that Mr. Lozman intended to argue that *res judicata* or collateral estoppel applies, we find that they do not. Res judicata does not apply because the cause of action here is clearly distinguishable from that of the state court action because of the change of factual circumstances (i.e., the imposition of new marina rules). *Citibank, N.A. v. Data Lease Fin.*

(Continued on following page)

2. This Court Has Subject Matter Jurisdiction

The United States Constitution establishes that judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction". U.S. CONST. art. III, §2, cl. 1. Pursuant to that clause, Congress vested federal district courts with original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction". 28 U.S.C. §1333(1).

The Eleventh Circuit has stated that whether federal courts have admiralty jurisdiction over a boat is decided by focusing on whether the boat "was rendered practically incapable of transportation or movement". *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299, 1312 (11th Cir. 2008); *see Miami River Boat Yard, Inc. v. 60' Houseboat,* 390 F.2d 596, 597 (5th Cir. 1968) (a houseboat that could only move under tow was still a vessel for jurisdictional purposes). The Eleventh Circuit focuses on a boat's capability of maritime transport, rather than its primary or present use, or the owner's intent. *Belle of Orleans,* 535 F.3d at 1310. In *Belle of Orleans,*

Corp., 904 F.2d 1498, 1501 (11th Cir. 1990) (listing one of the elements of *res judicata* to be that the same cause of action must be involved in both cases). Collateral estoppel does not apply either, as the issue at stake here is whether the Defendant is a vessel subject to admiralty jurisdiction, which was not an issue in a prior proceeding. *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985) (listing an element of collateral estoppel to be that "the issue at stake must be identical to the one alleged in the prior litigation").

the Eleventh Circuit considered both the Supreme Court's decision in *Stewart v. Dutra Construction Co.* and the Fifth Circuit's opinion in *Pleason v. Gulfport Shipbuilding* to establish its definition of vessel. *Id.* at 1306. The Eleventh Circuit placed primary focus on "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one" and whether the vessel was "'rendered practically incapable of transportation or movement'". *Id.* at 1309, 1312 (quoting *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496 (2005)). *Belle of Orleans* also emphasized that *Pleason* is still binding precedent. *Belle of Orleans,* 535 F.3d at 1309.[2] *Pleason* held that a boat that had a deck, cabins, and a superstructure, was capable of being used as a means of transportation and therefore subject to admiralty jurisdiction though it had no motor power of its own and no steering. *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621, 623 (5th Cir. 1955).

We earlier ruled that there was a factual dispute as to what the seized structure was, and we chose not to decide whether the floating structure was a vessel subject to this Court's jurisdiction. We now find that Mr. Lozman has put forth no evidence that would convince us that the vessel at issue is substantively different than the vessel *Pleason*. Like the vessel in *Pleason*, the Defendant vessel here was moored to the

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[2] *Bonner v. City of Prichard* held that all of the former Fifth Circuit opinions prior to October 1, 1981, are binding precedent on the Eleventh Circuit. 661 F.2d 1206, 1209 (11th Cir. 1981).

dock with cables, received power from the land, and needed to be towed in order to be moved. Mr. Lozman places significance on the fact that moving the Defendant vessel may easily damage it. However, the same was true of the vessel in *Belle of Orleans*. *Belle of Orleans,* 535 F.3d at 1312 ("the Belle of Orleans was capable of moving over water, albeit to her detriment, and was capable of being transported under tow"). Neither does the Defendant vessel's ability to be registered in Florida prevent it from being considered a vessel. *Id.* at 1311-12 ("state law can change. . . . if legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel. . . Such a result is clearly not what the Supreme Court intended."). Mr. Lozman also relies upon the Fifth Circuit's decision in *De La Rosa v. St. Charles Gaming Co.*, which ruled that an indefinitely moored casino ship with utility lines from land-based sources was not a vessel for purposes of admiralty jurisdiction. *De La Rosa,* 474 f.3d 185, 188 (5th Cir. 2006). However, the Eleventh Circuit specifically rejected the reasoning of *De La Rosa* in *Belle of Orleans*, and found that *Pleason* is still binding precedent. *Belle of Orleans,* 535 F.3d at 1311-12. This Court thus has admiralty jurisdiction over this action.

C. Maritime Trespass

Maritime trespass is governed by federal common law because "there is no distinct claim for maritime trespass under the admiralty substantive body

of law." *Stuart Cay Marina v. M/V Special Delivery*, 510 F. Supp. 2d 1063, 1075 (S.D. Fla. 2007). This Court has looked to Restatement (Second) of Torts for guidance on the requirements of a maritime trespass claim. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 158). The Restatement provides that a person is liable for trespass by intentionally remaining on land after the possessor of the land revokes its consent, so long as the person knows or has reason to know of the revocation of consent. RESTATEMENT (SECOND) OF TORTS §§158, 171. An actor is liable for trespass irrespective of whether the trespass "causes harm to any legally protected interest of the other". *Id.* at § 158.

It is undisputed that the Defendant vessel initially had consent to be in the marina. It is also undisputed that Mr. Lozman received notice in early March, 2009, that the vessel was to come into compliance by April 1, 2009, or trespass proceedings would be taken against it.[3] The Defendant vessel remained in the marina though Mr. Lozman never complied with the conditions of the letter. It is therefore undisputed that the Defendant vessel remained at the marina after the City terminated consent.

Mr. Lozman argues that the Defendant vessel was not trespassing because the City accepted payment

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[3] Mr. Lozman did not directly deny that he received the letter in his Response to Plaintiff's Motion for Partial Summary Judgment. [DE 110, ¶11]. The parties stated in their pretrial stipulation that it was an undisputed fact that he received the letter on March 10, 2009. [DE 138].

for the dockage fee for April, 2009. However, his own submitted evidence shows that the City credited and reversed the credit on his account on April 6, 2009, and that the City returned his check unprocessed. [DE 9, Ex. 5]. Mr. Lozman also argues that there was no damage caused by his vessel remaining at the marina because the slip remained empty for several months after it was seized. However, there need not be any actual harm in a trespass action. RESTATEMENT (SECOND) OF TORTS §§158. Mr. Lozman contends that he did not owe any money on his account prior to this April, 2009 payment, and that therefore there was no basis for a maritime lien. This argument is irrelevant, as the City is moving for summary judgment only on its claim for a maritime lien for maritime trespass, which does not require that the Defendant vessel owe the City any money. Mr. Lozman also asserts that federal preemption does not apply because the state court action is still being litigated for Mr. Lozman's counter-claim for damages. The state court eviction action is a separate proceeding for factual circumstances that have since changed significantly since Mr. Lozman prevailed in that case.

D. First Amendment Defense

Finally, Mr. Lozman argues that the City is violating his First Amendment rights by instituting this action in order to silence him. The City responds that Mr. Lozman has failed to satisfy his burden in raising this defense.

The party asserting that their First Amendment rights have been violated has the burden of "showing that their conduct was constitutionally protected and that the conduct was a substantial or motivating factor in the governmental decision to deny a benefit." *Cuban Museum of Arts & Culture, Inc. v. Miami,* 766 F. Supp. 1121, 1125 (S.D. Fla. 1991). The opposing party must then show by a preponderance of the evidence "that the benefit would have been denied in the absence of the protected conduct or expression." *Id.*

Mr. Lozman apparently argues that his opposition to a development project planned by the City is the constitutionally-protected conduct for which he is being retaliated against by the City. The City argues that Mr. Lozman has not properly put forth what conduct of his is constitutionally protected. We need not decide whether Mr. Lozman's opposition to the development project is constitutionally protected,[4] as Mr. Lozman has failed to show that his conduct was a substantial or motivating factor in the decision to not allow him to renew his lease. Mr. Lozman has presented no evidence that the City changed its rules and attempted to enforce them against him because of his opposition to the development plan. While the

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[4] We note that a jury found in a state court action (before the Fifteenth Judicial Circuit in and for Palm Beach County, *City of Riviera Beach v. Fane Lozman,* Case No. 50 2006 CA 014054) that the City previously attempted to terminate Mr. Lozman's lease for his exercise of protected speech. [DE 9, ex. 2].

timing of the rules changes after Mr. Lozman's victory against the City in a state court action concerning his constitutionally-protected rights is enough to raise eyebrows, it is not enough to show that his protected speech was a substantial or motivating factor in the City's decision.

Neither does the evidence that Mr. Lozman submitted establish that it was a substantial or motivating factor. Mr. Lozman has submitted evidence of a City Council meeting in which the members speak of trying to "intimidate" and "shadow" him. [DE 63, ex. 4]. However, this was a year before the decision to change the marina rules was made, and there was no mention of attempting to evict him. The newspaper articles Mr. Lozman relies upon do not add any weight to his claim. Even if they were admissible evidence, they merely state the City changed its rules in a personal vendetta against Mr. Lozman without giving the basis for their conclusion. [DE 69, Ex. 1; DE 42, ex. 5; DE 135, ex. 2]. Furthermore, some of the articles indicate another substantial or motivating factor for the rules changes: to remove all of those living at the marina in order to make way for the development project Mr. Lozman has been fighting. *Cuban Museum*, upon which Mr. Lozman primarily relies, indicated that there was evidence of the Miami City Commission's meetings in which the tenant's constitutionally-protected activity was discussed for years culminating in the decision to terminate the lease, and that the city's proffered reasons for the lease termination were pretextual. *Cuban Museum,*

766 F. Supp. 1121, 1124, 1126-1127 (S.D. Fla. 1991).[5] Mr. Lozman has not submitted similar evidence.

We therefore find that Mr. Lozman fails in establishing the First Amendment defense.

E. Mr. Lozman's Surreply

On October 6, 2009, Mr. Lozman filed a Surreply to Plaintiff's Motion for Partial Summary Judgment [DE 127]. The City responded with a Motion to Strike [DE 128], in which it argued that Mr. Lozman failed to request leave from the Court when filing the Surreply. Mr. Lozman responded by filing a Motion for Leave to File Surreply and to Deny the Plaintiff's Motion to Strike Surreply [DE 136], which we construe as also being a Response to the City's Motion to Strike.

Local Rule 7.1.C prohibits the filing of memoranda of law beyond responses and replies without prior leave of Court. S.D. Fla. L.R. 7.1.C. Mr. Lozman did not request leave prior to filing the Surreply, which

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[5] Mr. Lozman also complains of an intimidation campaign against him by the City involving litigation, false arrests, harassment at the marina, and forced removals from City Council meetings. Mr. Lozman's allegations in this regard are largely supported by inadmissible evidence. Furthermore, while the evidence suggests an ongoing feud between Mr. Lozman and the City, they do not establish a connection between Mr. Lozman's protected conduct and the specific action at issue here: the changing of the marina rules and their enforcement against the Defendant vessel.

would be grounds to deny his Motion. In this case, even if Mr. Lozman had properly requested leave prior to filing the Surreply, we would deny it. The City's Reply was limited to rebutting arguments in Mr. Lozman's Response as required by the Local Rules. *Id.* There was thus no need for this Court to allow Mr. Lozman to file an additional memorandum of law. We therefore grant the City's Motion to Strike and deny Mr. Lozman's Motion for Leave to File Surreply.

F. Mr. Lozman's Motion to Supplement the Record

Mr. Lozman filed a Motion to Supplement the Record [DE 135] on October 15, 2009. A Response was due on November 2, 2009, but the City failed to respond. We thus grant Mr. Lozman's Motion by default, noting that the evidence he supplied did not establish his First Amendment defense.

III. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff City of Riviera Beach's Motion for Partial Summary Judgment [DE 80] is hereby **GRANTED**;

2. Plaintiff City of Riviera Beach's Motion to Strike [DE 128] is hereby **GRANTED**;

3. Claimant's Surreply [DE 127] is hereby **STRICKEN**;

4. Claimant's Motion for Leave to File Surreply and to Deny the Plaintiff's Motion to Strike Surreply [DE 136] is hereby **DENIED**;

5. Claimant's Motion to Supplement the Record [DE 135] is hereby **GRANTED by default**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 18th day of November, 2009.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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Fane Lozman, pro se
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OPPOSITION BRIEF

No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

As the Petitioner himself argued in his initial brief to the Eleventh Circuit Court of Appeals, this case presents a "novel or unusual situation" requiring a "case by case approach" to reach resolution. Consequently, the case is a poor vehicle for resolving purported lower court conflicts because it is necessarily fact-bound. Further, the Petitioner now asserts "facts" directly contradicted by the record below, which are material to the formulation and resolution of the Question Presented in the Petition. Thus, the ongoing factual dispute presented in this case renders it unworthy of *certiorari*.

STATEMENT OF THE CASE

The Respondent incorporates by reference the statement of facts contained in the Eleventh Circuit's opinion. Pet. App. 3a-10a. The following facts bear further emphasis.

The Respondent owns and operates a municipal marina ("Marina"), which sits squarely on the navigable waters of the Atlantic Intracoastal Waterway in Riviera Beach, Florida. Pet. App. 3a. The Marina provides both wet and dry storage for approximately 510 commercial and recreational vessels. *Id.* Approximately 15% of the Marina's wet slips are occupied by commercial vessels, which use the Marina for storage, maintenance and a base of operations. Dkt.67-2, ¶¶ 7-8. The Marina is the base of operations for a ferry service, which normally makes several trips per day to Peanut Island Park, an island across the Atlantic Intracoastal Waterway from the Marina. *Id.* ¶ 10. Approximately 25% of the Marina's

dockage revenue comes from transient vessels—vessels docking at the marina for less than ten days—while en route to other destinations. *Id.* ¶ 9. Annually, a large number of these transient vessels docks at the Marina when either going to, or coming from, ports in the Bahamas. *Id.* Ten percent or less of the slips are rented to live-aboard vessels. Tr.1 66:17-18.

The Petitioner purchased the vessel that is the subject of this case (the "Vessel") in 2002. The bill of sale described the Vessel as a "homemade custom houseboat barge." Lozman Dep. 8:3 (Dkt. 98-1 at 3, 18). He had the Vessel towed from a location near Fort Myers, on the west coast of Florida, to North Bay Village, on the east coast of Florida; a voyage exceeding 200 miles. Pet. App. 3a. While in North Bay Village, the Petitioner moved the Vessel from one marina to another. Lozman Dep. 16:12-23 (Dkt. 98-1 at 4). Then, in 2006, the Petitioner towed the Vessel from North Bay Village to Riviera Beach, Florida using a borrowed thirty foot motorboat. *Id.* at 13:1-11(Dkt. 98-1 at 4). This voyage was more than 60 miles.

On March 10, 2006, the Petitioner executed a "Wet-Slip or Dry Storage Agreement" for dockage at the Marina. Pet. App. 3a-4a. The Agreement, in which the Vessel was described as a "houseboat," was for month-to-month dockage. Dkt. 67-3 at 1. In relevant part the Agreement provided:

> It is understood and agreed by the Owner that the services provided by The City of Riviera Beach hereinafter "City", are limited to providing storage space with an in/out launching service according to the terms of this agreement. Owners of vessels assigned

> slips, moorings, or dry-storage spaces as may be specifically designated by the City at Marina facilities agree to relinquish their berth when requested by the City. The City agrees, insofar as possible, to temporarily reassign these Owners to suitable berths at the same facility if space is available, or otherwise credit the Owner with equivalent time (days) at the current transient dockage rates in effect for the same facility. In addition to all other power and authority retained by the City, the City may at any time, in its absolute discretion, require the Owner to remove the vessel from its assigned storage area to another storage area within the Marina, and if the Owner fails to comply, the City shall have the right to move the vessel itself. The City also reserves the right to, in its absolute discretion, move any vessel off the floating docks.

Id. The Agreement further provided that it could be terminated by either party upon certain conditions, including:

> By written notice of termination by the City delivered to the owner at the address specified at least three (3) days prior to the effective date of termination. The Owner hereby agrees to remove the vessel from the City's premises by the date specified.

Id. at 3. Finally, the agreement also provided:

> In addition to any other remedies provided for in the Agreement, the Marina, as a provider of

> necessities to this vessel, has a maritime lien on the vessel and may bring a civil action In rem, under 46 United States Code 31342 in Federal Court, to arrest the vessel and enforce the lien and shall not be required to allege or prove in such action that credit was given to the vessel.

Id. at 2.

In 2009, the U.S. Marshals arrested the Vessel. Within hours of its arrest, it was towed south from Riviera Beach to the Miami River, another trip for the Vessel which exceeded 60 miles. The voyage to Miami resulted in no damage to the Vessel. It remains undisputed the Vessel, between 2002 and 2009, made voyages totaling hundreds of miles.

In its decision, the Eleventh Circuit specifically noted the Petitioner's assertions "that each of the three times the [Vessel] was moved over 250 feet it sustained serious damage and that it would have sunk two out of the three times if immediate underwater repairs had not been performed" were "without any evidentiary support in the record." Pet. App. 18a. Likewise, the Eleventh Circuit held there was no record evidence supporting the Petitioner's arguments regarding the Vessel being a "floating shack, built out of plywood with only 1/16" of fiberglass surrounding its unraked hull, without proper cleats for towing, no bilge pumps, no navigation aids, no lifeboats and other lifesaving equipment, no propulsion, [and] no steering." *Id.* 18a-19a.

REASONS FOR DENYING THE PETITION

In his initial brief on appeal to the Eleventh Circuit, the Petitioner conceded this case involved "a novel or unusual situation," which required "a case-by-case approach . . . to determine whether admiralty jurisdiction applies." App. Brief at 15-16 (*citing Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 875 (11th Cir. 2010)). Thus, by the Petitioner's own admission, this case turns on its unique circumstances, rendering it a poor vehicle to resolve the conflict alleged. The fact-bound nature of this case is evident in the Petitioner's formulation of the Question Presented: the sole Question Presented is bound by the essential factual predicate that the Vessel received "power *and other utilities from shore*."

Close examination of the cases chiefly relied upon by the Petitioner reveals that regardless of the test applied, there is nonetheless a fact-intensive inquiry required to determine vessel status. Evidence of substantial connection to shore is critical to the determination. *See De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir. 2006) (listing, among other things, numerous land based utilities supplied, including "water, telephone lines, sewer lines, cable television and data processing lines"); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995) (noting substantial physical connection to shore-side building and numerous "shore-side utility lines-telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer...."). Despite assurance that "all of the relevant facts are documented and undisputed," the Petitioner strains to assert facts showing the Vessel's substantial connection to shore that were never established in the record below. Further, the

Petitioner asserts "facts" squarely contradicted by the record evidence.

The lack of record evidence renders the Question Presented hypothetical in nature, which can be resolved only through advisory opinion. Further, the Petitioner's unsupported assertions reveal an ongoing factual dispute that, if reviewed, would reduce this Court to a court of error.

1. Factual Misstatements

The Petitioner's portrait of this litigation bears little resemblance to what was presented to the lower courts. In an apparent attempt to conform the facts of this case with those of *De La Rosa* and *Pavone*, the Petitioner affirmatively states the Vessel was "affixed to land-based utilities, including power, sewer lines, cable television, and the internet." Pet. 3. Further, the Petitioner asserts, among other things, the Vessel "contained no bilge pumps for expelling water during transport." *Id.* There is no dispute the Vessel received power from shore.[1] However, the Petitioner goes to great lengths to show other alleged substantial shore connections to evidence the Vessel's indefinite or permanent mooring at the Marina. These assertions are simply not true.

A. At no time was the Vessel affixed to a land-based sewer line while at the Marina. Indeed, the Petitioner's

1. This fact, by itself, is of no moment. Even transient vessels calling at the Marina could receive shore power, a fact clearly established at trial Tr.1 52:10-11. Thus, the receipt of shore power fails to distinguish the Vessel from other watercraft.

own deposition testimony conclusively establishes this fact:

> Q: Did you have a shore hookup for sewage at the dock at Riviera Beach?
>
> A: No. I was promised one but they never put it in.
>
> Q: But you hooked up knowing there wasn't one?
>
> A: I was told they were redoing the docks and that -- there was some excitement there because the county had given the city five million dollars to redo the docks, a five million dollar bond, but as of this date the five million dollars to redo the infrastructure of the docks which was to include the electrical, the water and the sewage, was not done, that's correct.
>
> Q: So did you make any arrangements to dispose of the sewage on your vessel from 2006 to 2009?
>
> A: No.
>
> Q: So, to the best of your knowledge, where was the sewage going?
>
> A: There wasn't much sewage going into that boat. Okay? But any gray water sewage, if there was any, would have been going over, overboard.
>
> Q: You say gray water sewage?

A: Gray water or sewage.

Q: Or sewage. So, both, going into the water?

A: That's correct.

Q: From 2006 to 2009?

A: That's correct.

Lozman Dep. 52:17-53:19 (Dkt. 98-1 at 13-14). Further, the Eleventh Circuit noted the absence of a sewage connection in rendering its decision. To wit, Judge Marcus noted the marina rules and regulations put in place in 2007 required vessels docked at the marina to "comply with the Florida Clean Vessel Act . . ., which, among other things, ***prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.***" Pet. App. 5a-6a (emphasis added).

B. The Petitioner's misrepresentation the Vessel "contained no bilge pumps for expelling water during transport" is contradicted by the record. According to the survey performed pursuant to the district court's order, the Vessel was fitted with "[b]ilge pumps and automatic float switches previously installed in the bilge [that] were neglected and were non-functional." Dkt. 44-2, 44-3 at 2. Thus, contrary to the Petitioner's argument the Vessel was "not designed ever to engage in maritime transportation," it was, in fact, equipped with bilge pumps customarily found on vessels.

C. The record is devoid of any evidence supporting the Petitioner's assertion the Vessel received cable

television and internet from shore. On the contrary, according to photographs taken during the Vessel's survey, the upper deck was fitted with a satellite dish. Dkt. 44-4 at 1. The Petitioner equipped the Vessel to be independent of land-based television and internet services.

D. The Petitioner concedes the Vessel "had cleats" but attempts, as was argued to the Eleventh Circuit, to downplay this fact by asserting the cleats "were inappropriate for towing." Pet. 3. The Eleventh Circuit specifically found the Petitioner's "own brief and the evidence presented at trial appear to contradict this point." Pet. App. 19a n.1. Indeed, the Petitioner presented evidence at trial that he hired a repairperson, who "fit the [Vessel] with four towing bitts prior to its approximately-seventy mile tow from North Bay Village to the City Marina." *Id.* And in light of the Petitioner's admission "the record here does not contain every factual detail" concerning the Vessel, the evidence contained in the record shows the Vessel was outfitted to be properly towed. Pet. 23. This fact is not arguable, given the Vessel was towed, successfully, for two voyages totaling approximately 150 miles after the towing bitts had been installed.

E. The Petitioner's contention that he had "applied for -- and been granted -- homestead protection" for the Vessel is at once unsupported by the record and a mischaracterization as to the operation of Florida homestead law. Pet. 19. First, one does not "apply for" homestead protection. It is a right that attaches by operation of state law provided certain circumstances are met. FLA. CONST. art. X, § 4. The Petitioner has never established the Vessel met the requirements for being a homesteaded property. The fact that the Petitioner

executed an affidavit and had it recorded does not amount to a grant of homestead. "The clerk's acceptance and recording of the document does not ensure the legal effect of such document. Rather, the clerk is merely performing his or her ministerial duty." Fla. AGO 2005-17, 2005 WL 735543 (Fla. A.G.). Second, of the many courts that have reviewed the Agreement and the Petitioner's tenancy rights, none have found that the Vessel was a homestead; the record reflects that in the earlier state court eviction action, the Agreement was held to create a nonresidential tenancy. Pet. App. 38a.

The import of these factual assertions cannot be overemphasized; such blatant misstatements alone render the Petition unworthy of *certiorari*. Even if the Petitioner can somehow show the misrepresentations are colorable or impliedly established, this Court would nonetheless be mired in a factual dispute that would likely result in a colossal waste of scarce judicial resources.

2. The Petitioner's intention the Vessel would never move across water again is raised for the first time in the Petition.

On top of the other factual issues presented above, Petitioner asserts, for the first time, his intention to indefinitely moor the Vessel on its arrival at the Marina, and for it "never to move across water again." Pet. 25. The record is barren of evidence of any such intent. If anything, the original Agreement, executed by the Petitioner, expressly set forth month-to-month dockage, which was terminable by the Marina on only three days notice *without cause*. Additionally, the Agreement required the Vessel to vacate the dock at the Marina's

request with no guarantee any other space would be made available. Accordingly, the Petitioner never had the unfettered control of the premises that would permit him to plausibly form the intent to keep his Vessel moored at the Marina forever. At best, any intent to moor the Vessel indefinitely can only be gleaned through review of the record for facts surrounding the Vessel's design and construction, its connection to shore, and its use as a means of transportation on water. This is precisely what the Eleventh Circuit did, and the Petitioner asks this Court to reexamine those factual determinations as would a court of error.

3. This case presents a minimal conflict that lacks substantial importance

A plain reading of the Eleventh Circuit's opinion clearly shows the court correctly applied the rule of law set forth in *Stewart v. Dutra Construction Co.* and based its holding on the Petitioner's failure to point to any established facts supporting his contention the Vessel was never designed or constructed for maritime transportation. This case, therefore, does not present the conflict suggested, as the Eleventh Circuit's holding was fact based. It cannot be said with confidence that ***any*** other court, applying ***any*** test, would have reached a different conclusion, when presented with such scant and contradictory evidence.

Further, the constellation of circumstances established in this case barely resembles those presented in *De La Rosa* or *Pavone*. Though there may be a conflict between the circuits on the test used to determine vessel status in cases of commercial gambling boats substantially

connected to shore, that conflict is not brought "into stark relief" in this case. Thus, not only is this case a terrible vehicle for resolving the purported conflict, but the novelty of this case shows that it is constrained by its unique facts and not sufficiently important to merit further review.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

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AND
BRIEFS

No. 11-626

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In The

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondent does not dispute that the question of what legal test determines "vessel" status is a tremendously important one. *See* Pet. 16-23; MLA Amicus Br. at 6 n.9. Nor does respondent dispute that for over a century prior to this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), it was settled that the question of whether a structure constituted a vessel turned on the structure's purpose, or intended use. As this Court summarized the test in 1903, "neither size, form, equipment, nor means of propulsion are determinative factors upon the question [of vessel status], which regards *only the purpose for which the craft was constructed, and the business in which it is engaged.*" *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added); *see also Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627 (1887) (key is the "purpose," or intended "use," of the structure); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-6 (4th ed. 2004) ("The most basic criterion used to decide whether a structure is a vessel is the *purpose* for which it is constructed and the business in which it is engaged.") (emphasis in original); 1 Steven F. Fridell, *Benedict on Admiralty* § 164 (6th ed. 1989) ("It is not the form, the construction, the rig, the equipment, or means of propulsion that establishes [vessel status], but the purpose and business of the craft as an instrument for maritime transportation, that is to say, whether the craft is a navigable

structure intended for maritime transportation.").[1] "The application of this criterion," this Court continued, traditionally has "ruled out [of the category of vessels] the floating dry dock, the floating wharf," as well as other indefinitely moored floating structures. *Perry*, 191 U.S. at 30. Even though such structures are capable of being towed across water, this Court has held that such structures, as well as other structures in subsequent cases, were not vessels because they were not used for maritime transportation or commerce. *See* Pet. 25-26 (discussing other cases).

Nor does respondent dispute that a square conflict has developed over whether *Stewart* somehow abrogated this purpose-based test and the decades of jurisprudence based upon it. Consistent with *Stewart*'s reaffirmation that the definition of "vessel" in 1 U.S.C. § 3 "should be construed . . . in light of the term's established meaning in general maritime law,"

---

[1] For a sample of pre-*Stewart* court of appeals cases following this rule, see *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) ("To be a vessel, the purpose and business must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters.") (internal quotation marks omitted); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2d Cir. 1996) ("the important factor" in determining whether a structure is a vessel "is the purpose for which the structure is presently being used – e.g., transportation, construction, etc."); *Hercules Co. v. The Brigadier General Absolom Baird*, 214 F.2d 66, 69 (3d Cir. 1954) ("[T]he purpose and business of the craft or use for which she is intended . . . are the factors which determine whether there is admiralty jurisdiction.").

543 U.S. at 492, the Fifth and Seventh Circuits continue to apply a purpose-based definition of vessel. *See* Pet. App. 16a (citing cases). In direct contrast, the Eleventh Circuit has interpreted *Stewart* to hold that vessel status now "does not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a. Accordingly, while neither the district court nor the Eleventh Circuit disputed that petitioner's structure would have been exempt from maritime jurisdiction in either the Fifth or Seventh Circuits (as well as under this Court's pre-*Stewart* jurisprudence), the courts below ruled the structure's purpose and use irrelevant and deemed it a vessel simply because it was capable of being towed across water without sinking. Pet. App. 21a, 40a-42a. This reasoning upends decades of jurisprudence and portends a dramatic expansion of the reach of maritime law in a federal circuit with substantial geographic coverage.

2. Respondent does not attempt to distinguish petitioner's floating residential structure from any other floating home, such as those in Seattle and Sausalito, or indefinitely moored commercial establishments. *See* Pet. 16-17 (describing common features and nationwide prevalence of such structures). Respondent nevertheless opposes certiorari on the ground that this case is an unsuitable vehicle for resolving the split of authority at issue. Respondent is mistaken. The fault line between the purpose-based test for determining "vessel" status and the "capability of tow" test dictates whether indefinitely moored

floating structures that are not intended for use in maritime transportation continue to fall outside of maritime jurisdiction. The floating home at issue here falls squarely in this category. Petitioner used the structure as his residence, and, as the Eleventh Circuit explained, it "was moored to a dock by cables, received power from land, and had no motive power or steering of its own." Pet. App. 19a; *accord* Pet. App. 41a-42a. Those qualities would exempt petitioner's floating home from vessel status according to a purpose-based test.

Respondent disputes this vehicle analysis on three grounds, none of which has merit.

a. First, respondent asserts that "[t]he record is barren of evidence" indicating that petitioner intended his vessel to remain indefinitely moored at respondent's marina. BIO 10. This is untrue; among other things, petitioner's driver's license and declaration of homestead listed the marina as his primary residence. Dkt. 81 at 5; Dft. Ex. 30. Indeed, the whole reason petitioner fought the eminent domain battle against respondent that triggered this litigation is because he wanted to live indefinitely in its marina instead of moving. Pet. App. 4a; *see also* Tr. 173 ("I don't want to go anywhere"). Lest there be any doubt, the construction of the floating residential structure itself – a rectangle with no means of propulsion or steering, built from plywood with French doors on either end, just above the waterline – made clear enough it was designed for stationary living, not

transportation. Dft. Ex. 31; Dkt. 44 (photos of the structure).

Any extent to which the current record lacks additional evidence of intent derives not from any failure on petitioner's part, but rather from the fact that Eleventh Circuit law at the time of the district court proceedings held that vessel status did "not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a (citing *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1310 (11th Cir. 2008)). Thus, the district court and Eleventh Circuit rejected on relevance grounds petitioner's attempt to present such evidence and granted summary judgment to the City simply because the structure was capable of being towed. *Id.*; Pet. App. 40a-42a. If this Court reverses and reaffirms that evidence of intent is relevant, all such evidence will be admissible on remand in the event it is necessary for petitioner to make any additional showing to remove any doubt that he should prevail on that ground.

b. Respondent next quibbles over various statements in the petition regarding the floating residential structure's form and equipment, suggesting that the structure was more like a boat than the petition lets on. BIO 6-10. Let petitioner be clear: even if respondent were right about all of these issues, it would not matter. Under the purpose-based test this Court has applied in cases other than *Stewart*, neither the "form" nor "equipment" of a structure, nor the mere fact that it could be towed over water,

determines vessel status. *Perry*, 191 U.S. at 30; *see also* 1 *Benedict on Admiralty* § 164 (vessel status does not depend on "the form, the construction, the rig, [or] the equipment"). Thus, in the Fifth and Seventh Circuit cases that the Eleventh Circuit rejected here, the floating, moored structures at issue actually *were* "boats," yet those courts still deemed them *not* to be "vessels" because their owners did not intend them to be used for transportation. Pet. 13-15 (discussing those cases). That is petitioner's legal argument here – that his structure was not a vessel because it was not intended to be used for maritime transportation. Hence, there is no need whatsoever for this Court to detain itself with the factual squabbles respondent raises.

In any event, respondent's quibbles are of little moment. First, respondent contends that petitioner's statement that his floating residential structure "contained no bilge pumps for expelling water during transport," Pet. 3, is inaccurate because the structure was actually "fitted with '[b]ilge pumps' . . . customarily found on vessels." BIO 8 (citing Dkt. 44). But the source respondent cites, a surveyor's report and exhibits, does not say that the structure was "fitted" with any pumps "customarily found on vessels." Those are respondent's words. In fact, the pumps were not installed on the structure at all; they were loose pumps that were not designed to operate during any kind of movement over water.

Second, respondent disputes whether evidence shows that the residential structure received television and internet service from shore. BIO 8-9. But a photo appended to respondent's own complaint shows the cable that delivered that service running into the structure, Dkt. 1 at 21; *see also* Dkt. 44 at 9-10 (additional photos). In addition, respondent obtained bank records from petitioner during discovery showing his payments to Bell South, the service provider.[2]

Third, respondent disputes petitioner's statement that the cleats installed on the structure "were inappropriate for towing," Pet. 3, emphasizing that the structure was, in fact, towed for several miles. BIO 9. But the import of the phrase "inappropriate for towing" – as petitioner explains later on that page and respondent does not contest – is that the structure was never designed to be towed significant distances and thus sustained serious damage due to its towings. Pet. 3; Pet. App. 18a. Petitioner did not imply that "inappropriate" meant "impossible."

Fourth, respondent states that, contrary to petitioner's assertion, the floating residential structure was not "affixed to a land-based sewer line while at

---

[2] The district court later quashed the subpoena that led to the production of those records and ordered respondent to return them as a sanction "for repeatedly disregarding the discovery cutoff date in the Court's orders and repeatedly disregarding the Local Rules pertaining to the timing of discovery requests," as well as improperly forwarding the records to another attorney not involved in this litigation. Dkt. 131 at 11.

the Marina." BIO 6. Respondent is correct on this point; the Petition contains an inadvertent misstatement in that respect. But the reality does not alter the legal equation here one iota: the structure was fitted for a land-based sewer line but was unable to hook up to one at the Marina during the relevant time period here because the Marina's infrastructure for allowing such hook ups was degraded and had not yet been rebuilt.

c. Finally, respondent disputes petitioner's assertion that he had applied for – and been granted – homestead protection for his floating residential structure. Once again, this issue is irrelevant to vessel status, Pet. App. 12a n.6, 17a, and thus has nothing to do with resolving the question presented. The only reason the Petition discusses Florida's homestead exemption is to highlight one way in which classifying a floating residential structure as a vessel has tangible consequences. *See* Pet. 18-19.

At any rate, respondent itself acknowledges that petitioner filed a properly certified declaration of homestead in Florida state court in 2006. BIO 10; *see also* Dft. Exh. 30. Even if a Florida court's acceptance of such a filing is not technically the same as "grant[ing]" it, BIO 10, respondent itself acknowledges that the right to homestead exemption "attaches by operation of state law provided certain circumstances are met," BIO 9, and there is no doubt that petitioner and his structure satisfied those circumstances. *See Miami Country Day Sch. v. Bakst*, 641 So.2d 467 (Fla. App. 1994) (floating home

that was "designed for use as [a] residence[]" and "was towed to its present location" at a marina was entitled to homestead exemption); *compare In re Hacker*, 260 B.R. 542, 546-47 (M.D. Fla. 2000) (distinguishing floating homes in this respect from houseboats customarily used for navigation). Nothing in respondent's brief, in fact, actually contends otherwise, and if it wishes to raise such a futile argument on remand, it may do so.

* * *

As the tone of respondent's brief indicates, the proceedings below were contentious and sometimes bitterly fought. But respondent overlooks the fact that the phase of the case for squabbling and histrionics is now over. All that remains is a pure issue of federal law – whether the test for determining whether vessel status turns on a structure's purpose/use or its mere ability to be towed without sinking – that the district court and the Eleventh Circuit implicitly recognized is outcome-determinative here. Pet. App. 16a, 19a, 42a. That issue is a critical one for the implementation of maritime law across the country, and this Court should resolve it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

MOTION FILED

DEC 19 2011

No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

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Supreme Court of the United States

No. 11-626

FANE LOZMAN,
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THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF WITHOUT THE CONSENT OF ALL THE PARTIES

Now comes the Maritime Law Association of the United States ("MLA") and pursuant to Supreme Court Rule 37.2(b) moves this Court for leave to file a brief as *amicus curiae* without the consent of all of the parties.

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,000 attorneys, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists

in maritime law, represent virtually all maritime interests – ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The Petitioner's legal representative has consented to the MLA filing an *amicus curiae* brief; however, the Respondent has not given its consent for the MLA to file an *amicus curiae* brief. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA wishes to submit the enclosed *amicus curiae* brief only to argue in favor of review. The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals.

No delay in the proceedings will result in the granting of this application and the MLA believes that the proposed *amicus curiae* brief will be of considerable help to the Court. Pursuant to Supreme Court Rule 37.2(b) the proposed *amicus curiae* brief is attached to this motion.

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IN THE

Supreme Court of the United States

No. 11-626

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of Fane Lozman for a writ of certiorari. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA submits this brief only to detail the issues that it believes warrant the attention of the Court and to argue in favor of review.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of over 3,000 attorneys, law professors, and other distinguished members of the maritime community. The MLA is affiliated with the American Bar Association and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The MLA's purposes, as stated in its Articles of Incorporation, are:

> To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping

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contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that all Parties received timely notice of the intent to file this brief and the Petitioner has given written consent to the filing of this brief. However, the Respondent has not given consent and this *amicus curiae* brief is submitted pursuant to Rule 37.2(b) as one document with the required motion for leave.

laws, regulations and practices of different nations.

In an effort to promote these objectives, the MLA has sponsored legislation dealing with maritime matters and has cooperated with Congressional Committees in the formulation of legislation. The MLA also assists with international maritime programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction.[2]

The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals.

SUMMARY OF ARGUMENT

The Petitioner has petitioned for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit that a floating structure[3] was a "vessel" pursuant to 1 U.S.C. § 3.[4]

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[2] *E.g., Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995).

[3] The structure was named as a defendant *in rem* in the lower court proceedings and described as "THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, her engines, tackle, appa-

Pet. App. 21a. In its ruling, the Eleventh Circuit relied on its earlier decisions and those of the former Fifth Circuit Court of Appeals[5] in determining that the floating structure was "practically capable of transportation over water" and therefore was a vessel such that the district court had federal admiralty jurisdiction over the structure. Pet. App. at 21a. The "vessel status" test applied by the Eleventh Circuit was based on its interpretation of this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005). The Eleventh Circuit relied upon language contained in *Stewart* which stated that the determination of whether a structure is a "vessel" focuses on "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." Pet. App. at 13a. The Eleventh Circuit's analysis of vessel status thus focuses on "the capability of the craft, 'not its present use or station.'" Pet. App. at 13a. This analysis differs from the approach employed by the U.S. Courts of Appeals for the Fifth and Seventh Circuits, which have considered the floating structure owner's intent as a relevant factor in determining vessel status. Pet. App. at 16a.

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rel, furniture, equipment and all other necessaries appertaining and belonging *in rem*". Pet. App. 1a.

[4] "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The conflict created by these cases related to the "vessel status" test creates substantial uncertainty for maritime entities, and those who advise them, about what standards and rules apply to floating structures. Specifically, the circuits are split on the issue of whether or not the intent of the owner of the structure is relevant to the determination of vessel status. The uncertainty created by these conflicting decisions will serve to both promote and prolong litigation of this issue. Therefore, the Court should grant certiorari to resolve the uncertainty and to promote uniformity in the application of the general maritime law.

ARGUMENT

I. THE CONFLICT OVER THE APPLICATION OF THE VESSEL STATUS TEST IN *STEWART v. DUTRA* CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ENTITIES AND THOSE WHO ADVISE THEM

The Respondent had originally brought a claim in the United States District Court for the Southern District of Florida against the floating structure *in rem* under 46 U.S.C. § 31342[6] which creates a mari-

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[6] § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

time lien in favor of a person providing "necessaries" to a vessel. Pet. App. at 7a. This required that the district court undertake an analysis of whether the floating structure constituted a "vessel" pursuant to 1 U.S.C. § 3. Pet. App. at 12a-13a. The Eleventh Court of Appeals affirmed the decision of the district court[7] that the floating structure on which the Petitioner resided was a "vessel" such that the district court had exclusive original jurisdiction as granted by the United States Constitution.[8] Pet. App. at 21a. The Eleventh Circuit's opinion specifically referenced and confirmed a split amongst the circuits as to the proper factors to consider in making a determination of whether a structure is a "vessel" under maritime statutory regimes and the general maritime law.[9]

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[7] The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review.

[8] Article III, Section 2, Clause 1 of the U.S. Constitution grants the federal district courts exclusive original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1).

[9] "The definition of a 'vessel' is important in many different contexts of admiralty and maritime law. Vessel status is important in determining jurisdiction since acts that occur aboard a vessel will be presumed, absent unusual circumstances, to meet the maritime relationship requirement. Furthermore, under the Admiralty Extension Act, [46 U.S.C. § 30101], land-based damages are within the jurisdiction if 'caused by a vessel.' The existence of a vessel also may be necessary for the assertion of a salvage award, liability for unseaworthiness, or a maritime lien under the general maritime law. The applicability of several statutes, such as the Jones Act, [46 U.S.C. §§ 30104-30106], the Longshore and Harbor Workers' Compensation Act, [33 U.S.C. §§ 901-950], the Limitation of Shipowners' Liability Act, [46 U.S.C. §§ 30501-30512], and the Outer Continental Shelf Lands Act, [43 U.S.C. §§ 1331-1356], may depend on whether a vessel

The Eleventh Circuit relied upon this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) in finding that because the floating structure had been towed several times over considerable distances, it was "practically capable of transportation over water" and therefore a vessel in navigation subject to federal admiralty jurisdiction. Pet. App. at 13a, 21a. The Eleventh Circuit also relied upon its own decisions where it had employed a broad definition of the term "vessel." Pet. App. at 12a-17a (citing *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955); *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial No. SC-40-2860-3-62*, 390 F.2d 596 (5th Cir. 1968); *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008); *Crimson Yachts v. Betty Lynn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010)). In particular, the Eleventh Circuit cited its prior decision in *M/V Belle of Orleans* where it had determined that a floating casino was a vessel based on the casino's potential ability to sail on the navigable waters. Pet. App. at 15a-16a. The Eleventh Circuit pointed out that in its *M/V Belle of Orleans* decision it had expressly rejected the reasoning of both the Fifth and Seventh Circuits, whose "vessel status" tests have focused on the floating structure owner's intended purpose for the structure rather than the structure's practical capability for maritime transportation. Pet. App. at 15a-16a (citing *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995)(holding that a floating casino that was semi-permanently and indefinitely moored to the shore was not a vessel because it was "removed from

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is involved." THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 1-6 at 35, 36 (West Group 2001) (1987).

navigation" and "constructed primarily to be used as a work platform"); *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (analyzing owner intent for purposes of whether a vessel can sail again)); *see also De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185, 187 (5th Cir. 2006) (concluding riverboat casino not a vessel due in part to casino owners' intent to use it only as a casino).

The differing legal standards employed by the various circuit decisions related to vessel status have produced substantial uncertainty for vessel owners and the owners of moored shore-side floating structures on the navigable waters. The split in the circuits also creates substantial uncertainty for those who advise the various maritime interests related to shore-side and maritime activities as the interested entities now face two legal standards which could possibly govern their conduct and operations. This disharmony imposes shifting standards of conduct and legal liability which encourages needless litigation until a verdict has been rendered and appealed.

All of these concerns make it appropriate for the Court to grant certiorari in this case and resolve the conflict amongst the circuits regarding the application of the vessel status test.

CONCLUSION

The MLA respectfully requests that the Court grant certiorari.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 8 - 2012
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No. 11-626

IN THE

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FANE LOZMAN,

Petitioner,

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THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 17, 2011
CERTIORARI GRANTED FEBRUARY 21, 2012

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

9:09-cv-80594-WPD

The City of Riviera Beach,

Plaintiff,

v.

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/20/2009	[1]	Verified complaint filed.
04/21/2009	[9]	Emergency motion to dismiss complaint filed.
04/23/2009	[19]	Order denying emergency motion to dismiss entered.
05/11/2009	[42]	Answer to complaint filed.
07/27/2009	[64]	Motion to dismiss verified complaint for lack of subject matter jurisdiction filed.
08/12/2009	[67]	Plaintiff's motion for partial summary judgment filed.

DATE	NO.	PROCEEDINGS
08/13/2009	[68]	Response to motion to dismiss for lack of subject matter jurisdiction filed.
09/09/2009	[103]	Order denying motion to dismiss for lack of subject matter jurisdiction entered.
09/15/2009	[110]	Claimant's response to plaintiff's corrected motion for partial summary judgment filed.
09/25/2009	[117]	Plaintiff's reply to response to motion for partial summary judgment filed.
11/18/2009	[150]	Order granting plaintiff's motion for partial summary judgment entered.
11/23/2009		Bench trial begins
11/24/2009		Bench trial completed
01/06/2010	[159]	Final judgment for plaintiff and order of sale of vehicle entered.
02/11/2010	[173]	Notice of appeal filed by claimant.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

10-10695

The City of Riviera Beach,

Plaintiff-Appellee,

v.

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*, *defendant*, Fane Lozman,

Claimant-Appellant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/19/2011		Opinion of the Eleventh Circuit, affirming judgment of district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed Apr. 20, 2009]

"IN ADMIRALTY"

Case No. 09-80594-Civ-DIMITROULEAS/SNOW

THE CITY OF RIVIERA BEACH,
Plaintiff,

vs.

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*,
Defendant.

VERIFIED COMPLAINT

Plaintiff, The City of Riviera Beach ("Plaintiff"), by and through its undersigned attorneys, hereby sues that certain unnamed, gray, two-story vessel approximately fifty-seven feet in length (the "Vessel"), her engines, tackle, equipment, furniture, auxiliary vessels, appurtenances, necessaries, etc., *in rem*, and alleges:

Parties and Jurisdiction

1. Plaintiff, at all relevant times, is a chartered Municipality which owns the Riviera Beach Municipal Marina (the "Marina"), located at 200 E. 13th St., Riviera Beach, Palm Beach County, Florida.

2. Defendant Vessel, together with her engines, tackle, equipment, furniture, auxiliary vessels, appurtenances, necessaries, etc., is currently located at the Marina, Slip Number 452, Riviera Beach, Florida, and is therefore located within the jurisdiction of this Court. *See* Photograph of Vessel attached hereto as Exhibit A.

3. This is an action within the admiralty and maritime jurisdiction of this Court as contemplated by 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. This action is for damages pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, 46 U.S.C. § 31342, and Local Admiralty Rule C. Plaintiff has a maritime lien in Plaintiff's favor and against the Defendant Vessel, *in rem*, for necessaries supplied to the Vessel, namely dockage, and for tort damages arising from the Vessel's continued trespass on Marina property.

Background Facts

4. On or before March 10, 2006, the Vessel's owner, on behalf of the Defendant Vessel, contracted with Plaintiff for dockage pursuant to a dockage agreement (the "First Agreement"), which was a standard agreement used by the Marina at the time. *See* First Agreement attached hereto as Exhibit B.

5. On or about August 9, 2006, the Plaintiff gave notice to the Vessel owner of the termination of the First Agreement for the Vessel owner's breach and demanded the Vessel be removed. *See* Letter attached hereto as Exhibit C.

6. The Vessel owner failed to remove the Vessel but continued to pay monthly dockage fees on behalf of the Vessel to the Plaintiff at the rate set forth in the terminated First Agreement.

7. On or about June 20, 2007, the Riviera Beach City Council passed a resolution (the "City Resolution") requiring vessels docked at the Marina to: 1) secure and maintain liability insurance to specified limits and name the Marina as an additional insured; 2) show proof of valid registration or documentation; 3) be operational and capable of vacating the Marina in case of an emergency; and 4) to comply with the Florida Clean Vessel Act.

8. On or about July 25, 2007, the Marina gave notice to all Marina customers of the new requirements, provided them with a new dockage agreement to be executed by September 30, 2007, and warned that any vessels not meeting the new requirements must vacate by October 1, 2007. *See* Notice attached hereto as Exhibit D.

9. The Defendant Vessel owner failed to execute the required New Agreement but continued to pay monthly dockage fees on behalf of the Vessel to Plaintiff.

10. On or about April 22, 2008, Plaintiff advised the Vessel owner concerning the Vessel owner's continued failure to comply with the City Resolution. *See* Letter attached hereto as Exhibit E.

11. Between September 2006 and March 2009, the Vessel fell behind in dockage fee payments in an amount totaling $1,464.38 as of March 31, 2009. During this period, the Plaintiff provided the Vessel owner with monthly statements showing the unpaid balance on the Vessel's account.

12. On or about March 6, 2009, Plaintiff gave final notice to Vessel's owner that the Vessel was behind in dockage fee payments and further advised the Vessel owner of the failure to execute the New

Agreement required as a condition of keeping the Vessel at the Marina. The Notice required the Vessel owner to pay monies owed in full and to execute the New Agreement by April 1, 2009, or remove the Vessel from the Marina.

13. The Vessel owner failed to pay the past due amounts or to execute the New Agreement, and the Vessel remains at the Marina without permission.

14. The Vessel owner has not provided the Marina with proof of registration or documentation or proof of insurance, and is believed to possess neither.

15. It is believed the vessel is not operational and is not capable of leaving the Marina under its own power in an emergency.

16. It is believed the Vessel has no Marine Sanitation Device and is otherwise in violation of the Florida Clean Vessel Act.

17. The Vessel poses a significant safety hazard to the Marina and other vessels, as it is in poor repair, is inadequately secured to the dock, presents a fire risk and is at risk of sinking. *See* Excerpt of independent marine surveyor Joel Sparrow's report attached hereto as Exhibit F.

18. The Vessel in its poor state of repair exposes Plaintiff to liability for the risks it poses to other Marina customers, their vessels, and nearby facilities, and is believed to pose a risk to the environment, particularly in the event of a hurricane or similar weather event.

Action

Count I: Enforcement of Maritime Lien – Necessaries

19. Plaintiff restates and incorporates Paragraphs 1 through 18 above as though fully set forth herein.

20. As of the date of this Verified Complaint, Plaintiff has a statutory maritime lien for the provisioning of necessaries, specifically safe harbor and dockage, to the Defendant Vessel in the total amount of $1,464.38 for past due charges exclusive of attorneys' fees and costs. Additionally, for each day the vessel remains docked without permission, it is receiving necessaries, specifically safe harbor and dockage at the Marina's expense, reasonably valued at the Marina's normal daily rate of $1.50 per foot. As of the date of this Verified Complaint, the value of the dockage provided after March 31, 2009 is $1,710.00, and continues to accrue on a daily basis. As of the date of this Verified Complaint, the total amount of the maritime lien is $3,174.38.

21. In addition to the above amounts, the Plaintiff is entitled to interest and costs, in amounts which will be proven at trial. As a result, Plaintiff was obliged to retain the law firm of Hamilton, Miller & Birthisel, LLP, 100 South Ashley Drive, Suite 1210, Tampa, Florida 33602, to protect its interest hereunder and will become responsible for paying Hamilton, Miller & Birthisel, LLP reasonable attorneys' fees and costs incurred herein.

Count II: Enforcement of Maritime Lien – Maritime Trespass

22. Plaintiff restates and incorporates Paragraphs 1 through 18 above as though fully set forth herein.

23. On or about March 6, 2009, the Vessel's owner was given notice of Plaintiff's April 1, 2009 revocation of permission to remain at the Marina based on the Vessel's delinquent account and the Vessel owner's failure to comply with the City's resolution. *See* Exhibit G.

24. As of the date of this Verified Complaint, Plaintiff has a maritime lien for the Defendant Vessel owner's intentional failure to remove the Vessel from its berth by April 1, 2009, despite a duty to do so, which constitutes a maritime tort.

25. As a direct and proximate result of the Vessel remaining docked at the Marina without permission, the Marina has been, and continues to be, damaged for loss of use of the slip and annoyance, together with interest and costs, the amounts of which will be proven at trial.

26. In addition to interest and costs above, Plaintiff was obliged to retain the law firm of Hamilton, Miller & Birthisel, LLP, 100 South Ashley Drive, Suite 1210, Tampa, Florida 33602 to protect its interest hereunder and will become responsible for paying Hamilton, Miller & Birthisel, LLP its reasonable attorneys' fees and costs incurred herein.

WHEREFORE, for the two counts alleged above, individually and collectively, Plaintiff, prays:

A. That process in due form of law according to the rules and practice of this Court in causes of admiralty and maritime jurisdiction be issued against the Vessel, her engines, tackle, equipment, rigging, furniture, auxiliary vessels, appurtenances, etc., *in rem*, citing it to appear and answer the matter aforesaid;

B. That pursuant to Supplemental Admiralty Rule C and Local Admiralty Rule C, a warrant of arrest be issued against the Vessel;

C. That judgment be entered, *in rem*, in favor of Plaintiff, The City of Riviera Beach, and against Defendant Vessel, recognizing Plaintiff's maritime lien;

D. That the Vessel be condemned and sold to satisfy the lien of Plaintiff, including pre-and-post judgment interest, attorneys' fees and costs;

E. That the Court enter judgment against the Vessel, for the amount of Plaintiff's damages, together with interest, administrative fees, costs, and attorneys' fees;

F. That Plaintiff have such other and further relief as the law and justice may require.

Dated: April 20, 2009

Respectfully submitted,

/s/ Jules V. Massee
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Attorneys for Plaintiff

STATE OF FLORIDA)
)ss.
COUNTY OF Palm Beach)

VERIFICATION

Pursuant to 28 U.S.C. § 1476, I, Edwin C. Legue, on behalf of The City of Riviera Beach, verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 20, 2009.

/s/ Edwin C. Legue
Edwin C. Legue
Marina Director, City of Riviera Beach

SWORN TO AND SUBSCRIBED before me this April 20, 2009.

/s/ David Napier
NOTARY PUBLIC

My Commission Expires: 11-24-2012

Personally known ✓ produced identification _____

Type of identification produced _____

[Seal]

EXHIBIT A

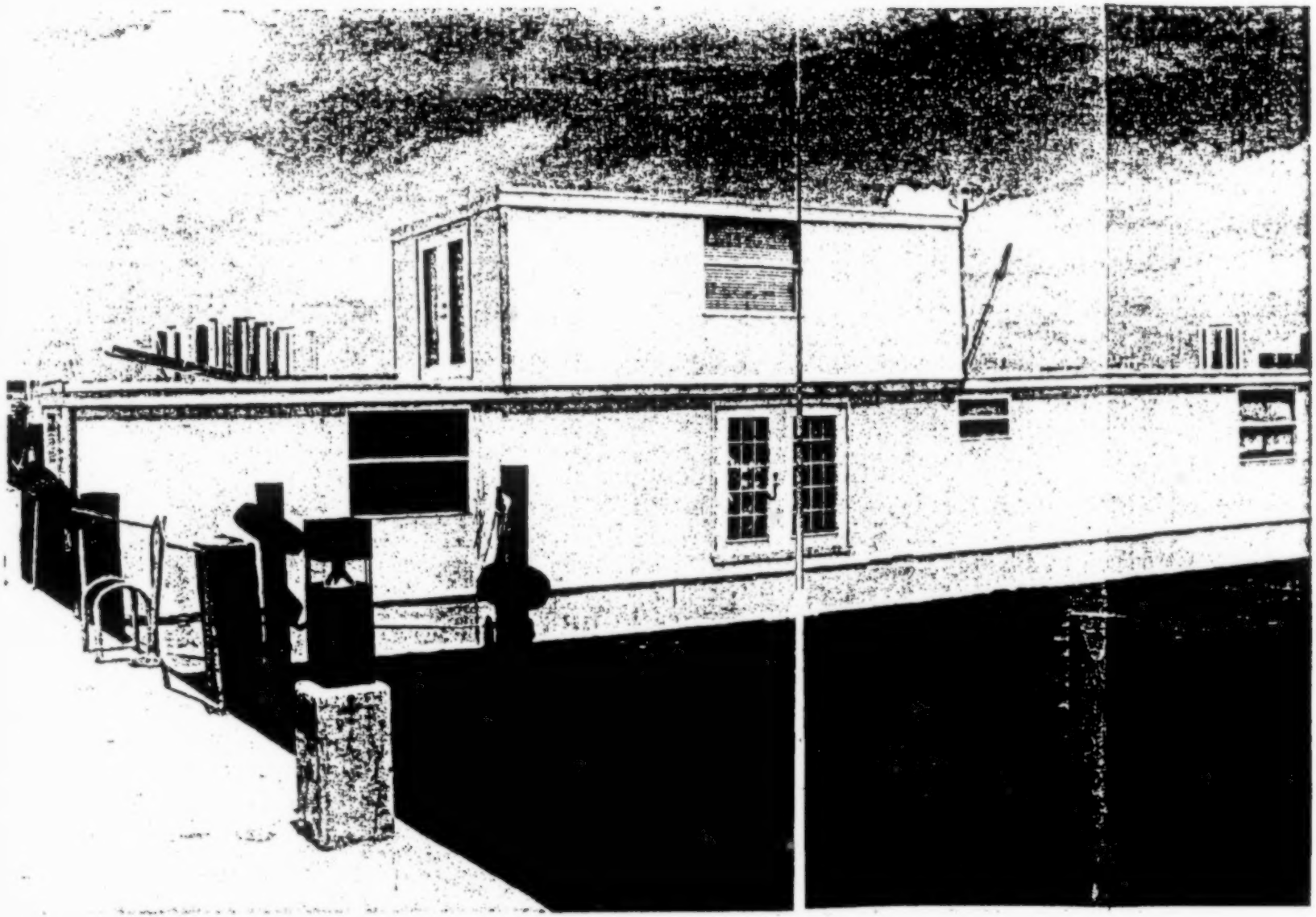


EXHIBIT B

[Seal] [Seal]

RIVIERA BEACH MARINA
WET-SLIP OR DRY STORAGE AGREEMENT

Wet Slip Agreement _X_ Dry Storage Agreement___

Power _____ Sail _____ Berth _____

Owner's Name Fane Lozman

Address 345 Ocean Drive

Miami Beach, FL Zip 33139

Telephone Res (786) 251-5868 Work ( ) _____

Boat Name _____

State & Reg No:_____

Make Houseboat Beam 12 Overall Length 57'

Monthly Rate 1008.90 Profile Charge _____

Accessory 100.00 250AMP Tax 65.58 Total 1174.48

Staff Raquel Date 3/10/06

IT IS AGREED AS FOLLOWS:

1. ASSIGNED SPACE: It is understood and agreed by the Owner that the services provided by The City of Riviera Beach hereinafter "City", are limited to providing storage space with an in/out launching service according to the terms of this agreement. Owners of vessels assigned slips, moorings, or dry-storage spaces as may be specifically designated by the City at Marina facilities agree to relinquish their berth when requested by the City. The City agrees, insofar as possible, to temporarily reassign these Owners to suitable berths at the same facility if

space is available, or otherwise credit the Owner with equivalent time (days) at then current transient dockage rates in effect for the same facility. In addition to all other power and authority retained by the City, the City may at any time, in its absolute discretion, require the Owner to remove the vessel from its assigned storage area to another storage area within the Marina, and if the Owner fails to comply, the City shall have the right to move the vessel itself. The City also reserves the right to, in its absolute discretion, move any vessel off the floating docks.

2. PAYMENT: The Owner agrees to pay the City storage fees as specified by Ordinance and any subsequent amendments thereto. The Owner also agrees that said fee shall be based on a thirty day month, shall be due and payable in advance on the first day of each month, and shall be considered delinquent if not paid in full on or before the tenth day of the month. Payments should be made to the City of Riviera Beach, c/o Marina. Delinquent accounts shall be subject to an automatic and progressive five percent delinquency charge. Transient vessel mooring and/or dry-storage fees are due and payable in advance daily or weekly as applicable.

TO SECURE PAYMENT OF SLIP, MOORING DRY-STORAGE FEES AND/OR SERVICE CHARGES, PURSUANT TO CHAPTERS 713 AND 85 FLORIDA STATUTES, THE OWNER HEREBY GRANTS THE CITY A LIEN UPON THE ABOVE DESCRIBED BOAT, MOTOR AND ACCESSORIES. IN THE EVENT THAT MOORING, DRY STORAGE FEES, AND/OR SERVICE CHARGES HAVE NOT BEEN PAID, THE OWNER HEREBY AGREES THAT CITY SHALL HAVE THE RIGHT TO RETAIN POSSESSION OF SAID VESSEL UNTIL SUCH

FEES AND/OR CHARGES ARE PAID, SAID RIGHT OF RETENTION SHALL INCLUDE BUT NOT BE LIMITED TO SECURING THE BOAT BY ANY MEANS NECESSARY TO PREVENT ITS REMOVAL AND/OR PLACING SAID VESSEL IN DRY STORAGE. IF SLIP, MOORING AND/OR DRY-STORAGE FEES REMAIN PAST DUE FOR A PERIOD OF SIX (6) MONTHS OR SERVICE CHARGES HAVE NOT BEEN PAID FOR A PERIOD OF NINETY (90) DAYS, THEN IT IS HEREBY MUTUALLY AGREED BETWEEN OWNER AND THE CITY THAT THE AFOREMENTIONED BOAT, MOTOR AND ACCESSORIES MAY BE SOLD BY THE CITY AT A NON-JUDICIAL SALE AS PROVIDED BY CHAPTER 328, FLORIDA STATUTES, IN ORDER TO SATISFY SAID LIEN.

In addition to any other remedies provided for in this Agreement, the Marina, as a provider of necessities to this vessel, has a maritime lien on the vessel and may bring a civil action *in rem*, under 46 United States Code 31342 in Federal Court, to arrest the vessel and enforce the lien and shall not be required to allege or prove in such action that credit was given to the vessel.

3. REMEDIES: Without otherwise limiting any other remedies as provided for by this Agreement, the City may pursue any other remedy provided by law. In the event a sale of the vessel is made as provided by statute or other collection procedure or legal action is required to collect any amount due under this Agreement, the Owner agrees to pay all costs of the sale and/or collection and a reasonable attorney's fee. Notice of non-judicial sale will mailed to the owner at the address indicated herein. The

Owner is responsible for notifying the Marina of any change in address.

4. NOTICE: The Owner agrees to notify the Marina in writing of any change in the information furnished by the Owner in this Agreement and any ownership change of the vessel within twenty-four (24) hours following such change. Failure to so notify City within said period of time shall be a default under this Agreement.

Any notification to the Owner pursuant to any of the provisions of this Agreement shall be sufficient if mailed to the mailing address as set forth in the Agreement.

5. ASSIGNMENT: It is understood and agreed that this Agreement is not assignable and that neither the dockage, nor the dry-storage may be assigned to others. Sub-leasing of moorings or dry-storage is strictly prohibited.

6. RENEWAL: This Agreement shall be renewed automatically each month unless terminated by either party in the manner provided herein. The City reserves the right to change daily, weekly, and monthly rates.

7. SECURITY: The City makes no warranties or representations concerning security at the premises, either for the facility in general or for the Owner's property in particular, including any means of ingress or egress thereto, or with regard to having an agent or employee on the premises.

8. BOAT REGISTRATION/DOCUMENTATION: The owner hereby agrees to provide current state, federal, or foreign power registration and/or documentation at the time of signing this Agreement and each time

the Agreement is renewed or at any time upon demand of the City Manager, Marina Director, or Dock Master.

9. Repairs: Only repairmen authorized by the City may enter the City's premises for the purpose of making repairs on the Owner's boat.

10. RULES/REGULATIONS: The Owner hereby agrees to abide by the rules and regulations set forth herein and any additional rules which from time to time may be conspicuously posted on the premises. Employees of the City are not authorized to deviate or alter these rules or regulations except by specific authorization from the City's Marina Director.

11. TERMINATION: This Agreement may be terminated upon any of the following conditions:

By breach, forfeiture, or default of any of the covenants or provisions of this Agreement, or by violation of any statute, ordinance, Marina rule or regulation or as otherwise provided in the Agreement.

By written notice of termination by the City delivered to the owner at the address specified at least three (3) days prior to the effective date of termination. The Owner hereby agrees to remove the vessel from the City's premises by the date specified.

By written notice of termination from the Owner delivered to the Marina Director or his designee accompanied by tender of unpaid fees or charges, if any. At that point, the Owner may remove the vessel from the City's premises. The minimum term of this Agreement is one month, and it is mutually agreed that there will be no refund of the unused portion of any monthly charge when this Agreement is terminated by the Owner.

By bonafide sale or rental of the vessel described in this Agreement.

By the designated mooring, dockage area and/or dry storage space becoming unserviceable for any reason whatsoever.

By lapse of proper insurance coverage, or any other Modification or cancellation, which causes the insurance coverage to fall, or to be in full force and effect.

In no event will be Owner be relinquished from his/her duty to pay all unpaid fees or charges.

12. RISK OF LOSS: The Owner shall be solely responsible for properly securing the boat and any equipment thereon. The City assumes no responsibility for the boat, and any equipment and/or other articles left aboard the boat, including but not limited to, radios, depth/fish sounders, navigational equipment, antennae, transducers, trim tabs, bimini tops, fishing poles, downriggers and/or outriggers

The assigned space whether slip, mooring or dry-storage space shall be occupied at the sole risk of the Owner. The City shall not be liable in any way for any loss or damage sustained by Owner or anyone claiming by, through or under Owner arising out of any action or inaction by the City, its employees and/or agents in connection with the City's premises, the use of the assigned space, or in connection with the Owner's boat, motor and/or accessories while it is on the premises. Nor shall the City be liable for any loss or damage to the Boat, its equipment or property stored thereon, due to fire, theft, vandalism, collision, City equipment failure, wind storm, rain, hurricane, or other casualty loss.

13. INDEMNIFICATION: The Owner for himself, his heirs, successors, executors, administrators, and assigns hereby waives any right it has to claim any loss or damage sustained by Owner or anyone claiming by, through or under Owner arising out of any action or inaction by the City, its employees and/or agents in connection with the City's premises, the use of the assigned space, or in connection with the Owner's boat, motor and/or accessories and/or due to fire, theft, vandalism, collision, City equipment failure, wind storm, rain, hurricane, or other casualty loss while it is on the premises

Owner agrees to indemnify the City against all claims, actions, liability and damages, including attorney's fees, whether claimed by the owner, its guests, family, employees, agents or other third parties, arising out of the Owner's possession and/or use of the assigned space and other facilities of the Marina.

Owner agrees to indemnify the City from and against any claim, suit, loss, liability or costs, including attorney's fees arising out of, or resulting from, any use, operation or occupancy of the Boat by Owner or anyone claiming by, through or under Owner.

14. INSURANCE: The Owner hereby agrees and covenants for the term of this Agreement to maintain a marine and watercraft liability insurance policy(s), copies of which shall be given to the Marina within five (5) days of signing this Agreement. Said insurance shall be in operative force and effect throughout the term of this Agreement, or any extension hereof.

15. OWNERSHIP/AUTHORITY: The person signing below does verify that he is the lawful Owner of the vessel hereinabove described or is authorized by the

Owner to subject such vessel to the provisions of this Agreement.

Part ownership of a vessel does not in any way imply an obligation on the part of the City to furnish dockage or dry-storage to any persons other than the original signer of this Agreement. In the event of dissolution of a corporation, partnership, or any other entity, or the withdrawal of a part owner from such a partnership, or other entity, all parties shall nonetheless be bound by the terms and conditions of this Agreement and be obligated to the City for the payments of all sums due and the performance of all its covenants, terms and conditions.

16. VENUE: This Agreement and any dispute, disagreement, or issue of construction or interpretation arising hereunder whether relating to its execution, its validity, the obligations provided therein, performance or breach shall be governed and interpreted according to laws of the State of Florida. Any and all legal action necessary to enforce the agreement will be held in Palm Beach County, Florida. No remedy herein conferred upon any party is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. No single or partial exercise by any party of any right, power or remedy hereunder shall preclude any other or further exercise thereof.

17. SEVERABILITY: If any term or provision of this Contract, or the application thereof to any person or circumstances, shall, to any extent, be held invalid or unenforceable, the remainder of this Contract, or the application of such terms or provision, to persons or circumstances other than those as to which it is held

invalid or unenforceable, shall not be affected, and every other term and provision of this Contract shall be deemed valid and enforceable to the extent permitted by law.

18. INTEGRATION: This Agreement contains the entire understanding of the parties and may not be modified except in writing and signed by both parties.

I have read and fully understand the conditions set forth above and agree to abide by each and every one of them and do hereby voluntarily enter into this Agreement with the City.

As of this _____ day of _____, 20_____

/s/ Fane Lozman

_____

(Parent or legal guardian, if owner is under 19 years old)

[Seal] [Seal]

EXHIBIT C

[Seal] CITY OF RIVIERA BEACH

200 East 13th Street Riviera Reach, Florida 33404
Phone (561) 842-7808 Fax (561) 845-8197

Office of
City Marina

Via hand delivery & U.S. Mail

Mr. Fane Lozman August 18, 2006
2100 Broadway
Riviera Beach, FL 33404

Dear Mr. Lozman:

On August 9, 2006, I wrote you a letter terminating your dockage agreement for violation of the Marina Agreement and Rules and Regulations of the Marina. In that letter the City gave you until August 31, 2006, to vacate the Marina on the condition that you muzzle your dog whenever you had him in any public space within the Marina. It is with regret that the City has to retract the deadline of August 31, 2006. Because you have refused to abide by the request to muzzle your dog, and have violated more rules and regulations as explained below, the City is hereby terminating your Wet Slip Agreement dated 3/10/06 in accordance with section 11 entitled "Termination," paragraphs one and two which provide:

> 11. TERMINATION: This Agreement may be terminated upon any of the following conditions:
>
> By breach, forfeiture, or default of any of the covenants or provisions of this Agreement, or by violation of any statute, ordinance, Marina rule

or regulation or as otherwise provided in this Agreement.

By written notice of termination by the City delivered to the owner at the address specified at least three (3) days prior to the effective date of termination. The Owner hereby agrees to remove the vessel from the City's premises by the date specified.

As you are aware I have asked you, on numerous occasions (verbally and in writing), to please muzzle your dog when he's in public spaces because other tenants have complained about his violent behavior—behavior that I have witnessed first hand. Although you initially complied with this request, in the last couple of weeks you have disregarded the request and allowed your dog to go un-muzzled, barking and snapping at tenants and other pedestrians.

Next, you continue to make major boat repairs despite repeated demands that you cease and desist. Initially, when during the weekend of August 12th through 14th, you first removed the upper west wall of your vessel and illegally dumped it on our city street we (Asst. Chief Harris, you & I) discussed the matter and you agreed to remove the illegally dumped wall from the City street. In turn, Asst. Chief Harris and I allowed you to put up a new wall that day and you agreed *NOT* to do any further work in violation of Marina Rules and Regulations (sections 8 & 9), i.e., you agreed to do no further major repairs on your vessel. However, you blatantly violated the promise you made to Asst. Chief Harris and me by doing extensive roof work and ignored my written demand to stop work and remove construction material from the upper deck of your boat. This demand was for the safety and welfare of the public.

Moreover, you repeatedly violate section 9 of the Wet Slip Agreement which requires that "[o]nly repairmen authorized by the City may enter the City's premises for the purpose of making repairs on the Owner's boat." The City only allows licensed insured craftsmen to do repairs within the Marina facility, but the person you hired has no license or insurance. Further, you did not seek or receive authorization to have him work on your vessel. Although the City has repeatedly stopped your repairman from doing the work, as late as today, he was back making repairs on your vessel.

The City can no longer allow you to blatantly disregard its Wet Slip Agreement and its Rules and Regulations. Therefore, for the reasons stated above, and in accordance with section 11 of the Wet Slip Agreement, please allow this letter to serve as written notice that your Wet Slip Agreement with the City of Riviera Beach is terminated effective August 21, 2006. You shall have seven (7) days from August 21, 2006, to vacate the premises, i.e., August 28, 2006. Failure to remove your vessel by August 28, 2006, will result in eviction proceedings being filed against you.

Sincerely,

/s/ George A. Carter
George A. Carter
Marina Director

Cc: Gloria Shuttlesworth, Asst. City Manager
City Files

GC/rs

EXHIBIT D

[Seal] CITY OF RIVIERA BEACH

200 East 13th Street Riviera Reach, Florida 33404
Phone (561) 842-7808 Fax (561) 845-8197

Office of
City Marina

July 25, 2007

Subject: New Marina Dockage Agreement

Dear Marina Customer:

Please be advised that the City of Riviera Beach City Council passed a resolution on June 20, 2007, approving a new Marina Dockage Agreement (with Exhibits) and new Rules and Regulations (hereinafter collectively referred to as "Agreement"). Although the new Agreement technically goes into effect on September 1, 2007 (pursuant to the resolution), all current marina customers will be given until September 30, 2007, to turn in a signed Agreement. Any vessel that does not meet the requirements of this new Agreement will be required to vacate the marina by October 1, 2007.

The new Agreement will require, among other things that all vessels have marina insurance with limits set at $500,000 Bodily Injury & $500,000 Property Damage or $1,000,000 combined single limit. This insurance requirement is necessary to insure not only your vessel but to protect the marina and other vessels from damage costs caused by your vessel. In addition, the Agreement requires all vessels to have valid registration or documentation, all vessels are to be operational and be able to vacate their slip under

their own propulsion in case of an emergency, and it requires that your vessel comply with the Florida Clean Vessel Act (a copy of which can be reviewed at the Marina office). Finally, all owners will be required to pay one month's rent as a security deposit.

The new Agreement is enclosed for your review and execution. Again, if you cannot meet the terms of the Agreement, you will be required to vacate the Marina by October 1, 2007, or face eviction. If you have any questions, please do not hesitate to contact the Marina Office.

On behalf of the entire Marina staff, we look forward to working with you to make the Marina one of the safest in South Florida. Thank you for your attention to this matter.

Sincerely,

/s/ Douglas E. Mason
Douglas E. Mason
Interim Marina Director

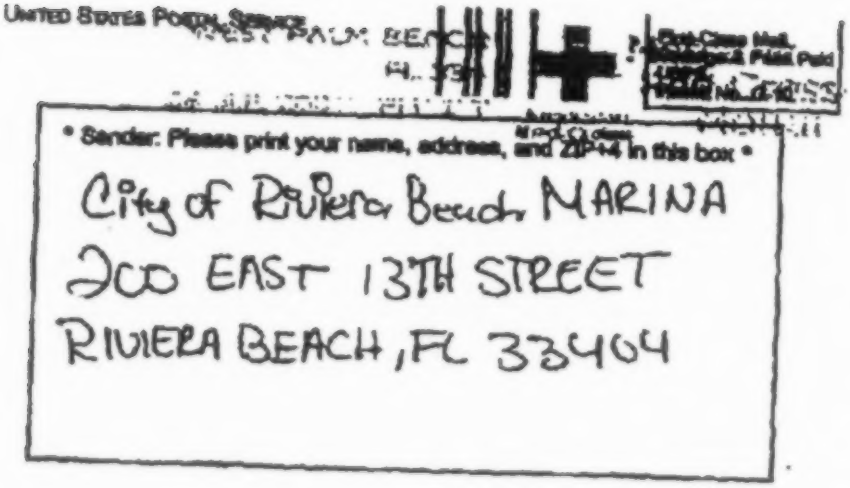
Enclosures: Marina Dockage Agreement and Rules and Regulations

27

First Contract Mail Out

July 23, 2007

Fane Lozman



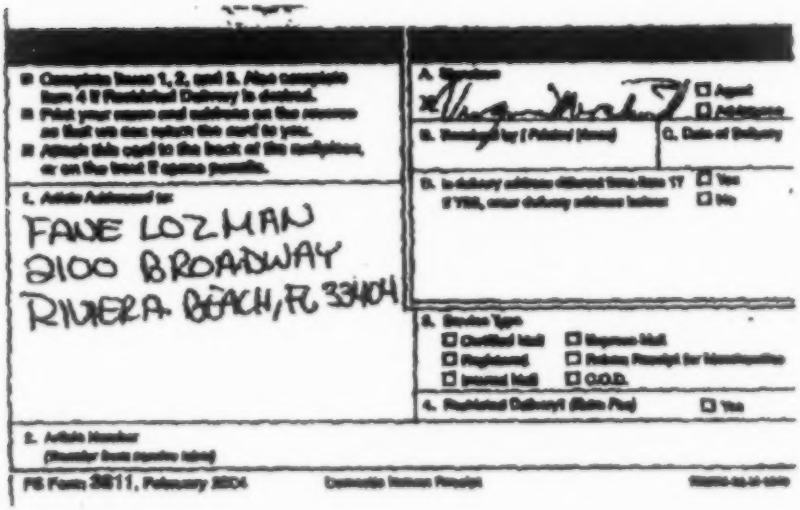


EXHIBIT E

[Seal] CITY OF RIVIERA BEACH

200 East 13th Street Riviera Reach, Florida 33404
Phone (561) 842-7808 Fax (561) 845-8197

Office of
City Marina

April 22, 2008 Ref# 3311/453

Fane Lozman
2100 Broadway
Rivera Beach, FL 33404

Subject: Non-compliance with Marina Dockage Requirements and Notice of Liability for Costs

Dear Mr. Lozman,

As you are aware, the City of Riviera Beach's "Marina Dockage Agreement" contains certain requirements for insurance coverage and limits, registration information, condition of the vessel, and other essential elements that must be complied with. You were notified by our letter dated January 25, 2008 that you had not provided the Marina with certain required information and/or a signed agreement. As you know, the City's agreement to lease its slips is a month-to-month agreement which contains termination provisions for non-compliance, among other stipulations. Since you were being provided dockage in the Marina before the new "Marina Dockage Agreement" became effective, we have not yet taken formal action to enforce our rights against you and your vessel under the general maritime law for non-compliance. However, procedures are being imple-

mented immediately to take the necessary steps to enforce the City's rights under the general maritime law.

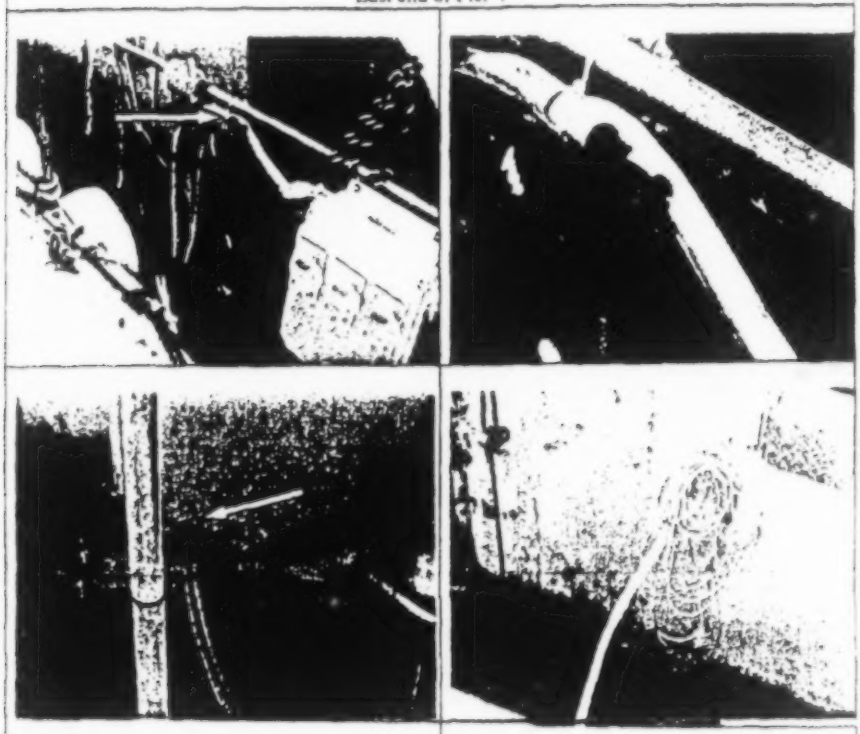
Please be advised that as long as your vessel remains at the Marina during this process, you are liable for the payment of all fees, costs, and other necessaries incurred by you and your vessel, including any costs associated with enforcement of liens on your vessel. Additionally, you are responsible for complying with all of the Marina's rules, regulations, and the provisions of the new "Marina Dockage Agreement." The City's acceptance of any payments made by you does not imply or otherwise indicate that you are considered in compliance with the new "Marina Dockage Agreement" or any of its provisions to which you are currently considered to be in violation.

We appreciate your assistance in this matter.

Sincerely,

/s/ Paul D. White
Paul D. White
Assistant City Manager/Interim Marina Director
City of Riviera Beach Municipal Marina

Gray House Boat
East end of Pier 4



Conclusion:

It is my opinion that the aforementioned house boats present the greatest peril to the marina in the event of a tropical or named wind storm. The gray house boat is poorly secured and the dock lines are deteriorated. The location where the boats are located is the least desirable for the safety of the marina. The area where the hose boats are docked is one of the most desirable locations and could easily be converted to accommodate several large motor yachts stern to the dock. I recommend that both dockage agreements are terminated or not renewed.

In the event the house boats remain in the Marina I recommend that both owners prove the hull integrity by hauling and submitting a professional inspection report. Management should consider placing both house boats alongside pier one where they can be secured to the concrete sea wall. I recommend that both house boat owners provide proof of insurance with sufficient liability and coverage for salvage and wreck removal in the event they break loose or sink.

DINGHY DOCK SPUD BARGES:

During my inspection I observed that the marina is providing a dinghy dock for the transient anchorage vessels or anyone who would like to tie up consisting of three steel barges with a gangway to pier four.

EXHIBIT G

[Seal] CITY OF RIVIERA BEACH

200 East 13th Street Riviera Reach, Florida 33404
Phone (561) 842-7808 Fax (561) 845-8197

Office of
City Marina

March 6, 2009

Fane Lozman
2100 Broadway
Rivera Beach, FL 33404

Subject: FINAL NOTICE ACCT. # 3311, AND TRIUMPHANT

Dear Fane Lozman:

As a condition of docking your vessel at the City of Riviera Beach Marina, you are required to execute the "Marina Dockage Agreement," which contains, among other provisions, requirements to show proof of insurance coverage to specified limits, provide registration information, and maintain your vessel to acceptable safety standards. You have been previously advised of these conditions, and have been given ample time to come into compliance. To date, you have failed to execute the agreement, or otherwise meet the requirements to dock your vessel at the Marina.

Further, your vessel has received dockage and other necessaries for which you have failed to pay, and your account is seriously delinquent in the amount of **$2,537.83**. As a result of this and your failure to comply with Marina requirements, you are

trespassing. **You are directed to remove your vessel from the Marina within fifteen (15) days from the date of this letter.** After this, you will be liable for the current Marina transient rate of $1.50 per foot for every day the vessel remains docked without permission.

Should your vessel remain and you fail to pay your account in full, execute the "Marina Dockage Agreement," and otherwise bring your vessel into compliance with the Agreement's provisions by April 1, 2009, the City will promptly institute legal proceedings against you and your vessel for trespass and to foreclose the City's lien on your vessel, including interest, costs and attorney's fees. This notice is entirely without prejudice to any additional rights the City may have against you or your vessel.

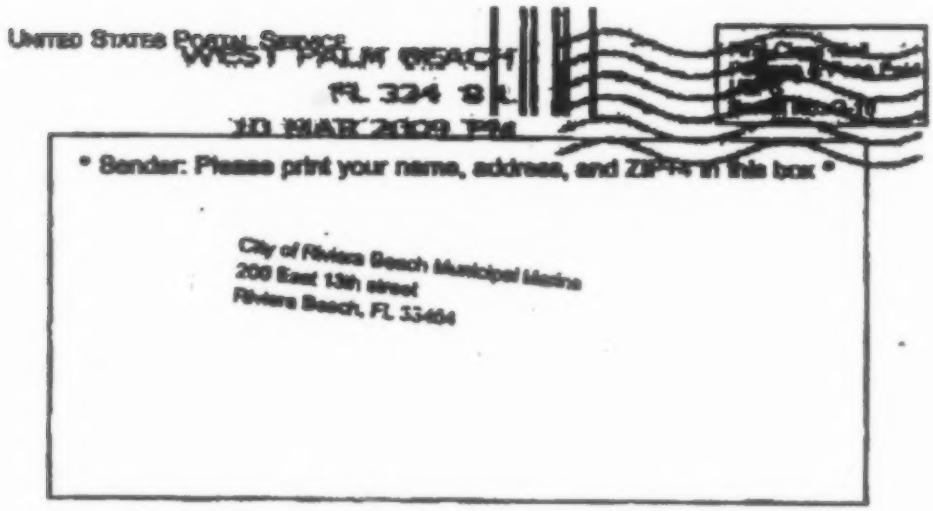
Please govern yourself accordingly.

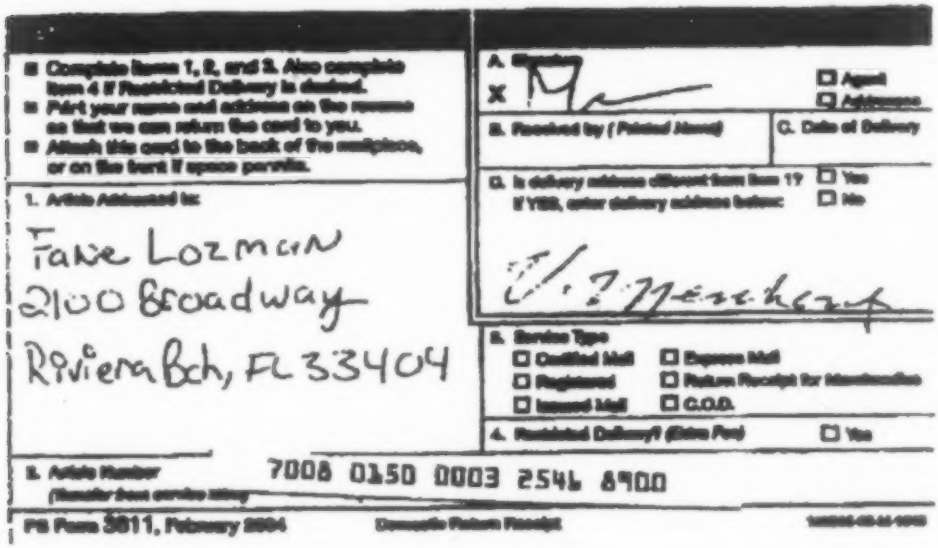
/s/ Edwin Legue
Edwin Legue
Marina Director

Most Recent Mail Out

March 10, 2009

Fane Lozman





MIAMI YACHT SURVEYORS
REPORT OF SURVEY

Miami Yacht Surveyors, Inc.
3650 N W 89 Way
Cooper City, Florida 33024
Telephone (954) 437 6717
Fax (954) 437 2864

60' x 12' wooden houseboat

VESSEL TYPE	Wooden houseboat	
BUILDER	Unknown	
HULL IDENTIFICATION NUMBER	None sighted.	
YEAR OF BUILD	Unknown	
CURRENT MARKET VALUE	Between $5,000.00 & $7,500.00	
DATE & PURPOSE OF SURVEY	General condition	
PRINCIPAL DIMENSIONS [per design]	LOA	Approx 60'
	BEAM	Approx 12'
	DRAFT	Approx 10"
	DISPL	Approx NA

Scope of survey: This is to certify that the undersigned marine surveyor did at the request of Mr. Jules Massee, for the account and interest of Hamilton, Miller and Birthisel, LLP attend survey to the above captioned vessel while afloat on April 28th, 2009. Attending survey were, representative for custodian National Maritime Services. Survey held in order to ascertain the general condition and valuation. Inspection held at 3850 NW North River Drive, Miami, Fl 33142.

HULL

Construction: Plywood, exterior covered with protective sheathing. Two level.

Superstructure: Plywood, exterior covered with protective sheathing.

Deck: Plywood.

Hull fittings: Plastic.

Bulkheads: 90 partial partitions below the main deck.

Frames/stringers: Three compartments below main deck. Unable to inspect all of vessel due to limited access.

Comments: The houseboat was built from plywood, principal dimensions were: 60' long x 12' wide. The bilge space was 4' between the bottom of the hull and the underside of the main floor, it had been divided into three main areas, each 4' in width. The main floor was supported by frames between the bottom of the bilge [hull bottom] located on 2' centers providing 30 separate compartments per hull division. The plywood comprising on the main bilge was unfinished, there was no protection from damage associated from water intrusion. Water had collected in the bilge spaces below the main bedroom and main hallway, the surface of the plywood evidenced deterioration and rot. Bilge pumps and automatic float switches previously installed in the bilge had been were neglected and were non-functional. The bottom of the bilge at the perimeter of the structure was distorted upward. The discharge pipe for the toilet waste holding tank above water suction was unsealed from water intrusion, this will allow water to enter into the bilge compartment resulting in mold and rot.

The exterior of the house boat was in average condition. Exterior sheathing and corner trim appeared intact. Fastening cleats were comprised of steel rails welded to brackets which were through bolted to the corners of the hull. The vessel was secured to the canal wall by ropes at all four corners of the structure. The boarding or entry side of the structure was protected from abrasion or impact by rubber tires which were secured to the canal, the vessel was safe from damages by windstorm. As reported, the vessel had been towed approximately 80 nautical miles, there were no observations to indicate recent damage from this tow.

The vessel had a second level serving as an office with a desk chair, open floor space with access to a sun deck. The office flooring was vinyl, the office space was generally untidy. There was animal feces laying on the floor in two locations.

The interior was comprised of a 12' x 12' bedroom with access to bilge space below. The bedroom was not equipped with a bed or dressing area, the mattress was laying on the floor, linens were soiled, there did not appear to be indications of recent habitation. Adjacent to the bedroom was bathroom with domestic sink, medicine cabinet, domestic style toilet, tub & shower. A 3' x 3' area of the ceiling above the toilet was missing.

Adjacent to the bedroom was a clothes storage room containing clean and dirty clothes. A 4' x 3' area to the ceiling had been discolored by water leaks from the roof. A 1' x 1' area of ceiling in this room had breached from the weight of water exposing the wooden deck, the "popcorn" finish and drywall material were missing.

Water stains to the ceiling in the hall way outside the clothes storage room, bedroom and toilet were visible.

The houseboat was equipped with a domestic style air conditioning air handler manufactured by Armstrong located in a separate locker. The return air filter was unsecured over the top of the return air intake, the air handler enclosure was generally dirty, the louvered door was fouled with animal hair.

Based upon the observed conditions the structure is likely more than 10 years old.

ELECTRICAL

Primary voltage:	Shore power, 220 volt.
Battery voltage:	None sighted.
Primary breaker:	Amperage rating not visible.
Batteries:	None
Galvanic isolator:	None sighted.
Battery isolation:	None.
Load panel:	Separate A.C panel in main hallway
Charging system:	None
Wiring harness:	Plastic coated, multi-strand copper
Alternator:	Standard
G.F.I.	Yes, tested & proven operative.
Polarity indicator:	None

blocking. If the rotten wood bottom is not replaced the deterioration will spread and flooding may result.

Prior to any human habitation the house boat requires a complete cleaning, removal of animal feces, repair to water damaged interior ceilings and repair to leaks per discovery.

Comparables: A search for wooden houseboats [without power] listed for sale in the state of Florida yielded no results.

Value: The market value is based primary on condition of the structure. The bottom of the structure requires repair prior to safe habitation. These repairs are problematic for a prospective purchaser. The value is based upon: repair work to the bottom of the structure and obtaining an insurance policy acceptable by a marina. Any such marina must have a waste pump out station to accept the waste in the holding tank.

The fair market value of the houseboat as observed on April 28th, 2009 is between $5,000.00 and $7,500.00

Signed without prejudice, copy of this report sent via e-mail, pdf format on this day, May 7th 2009. The original remains with Miami Yacht Surveyors.

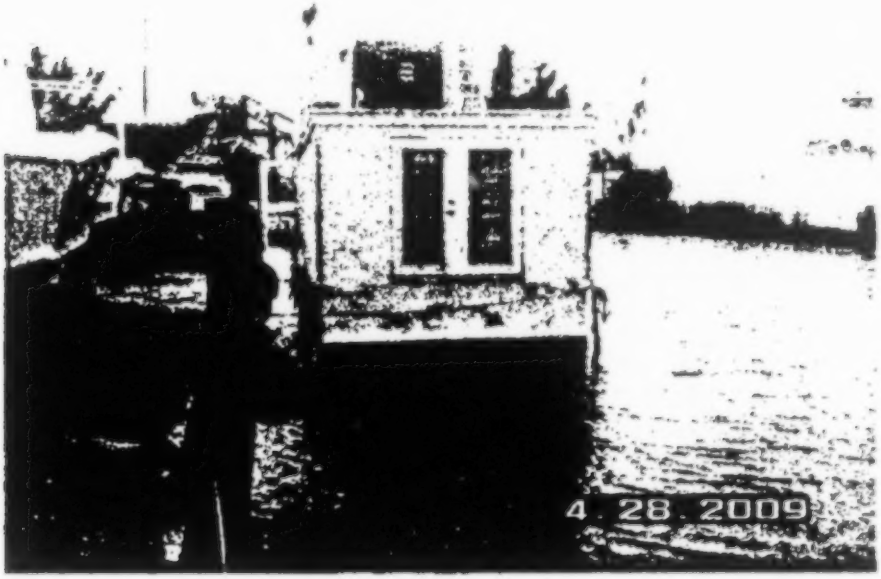
Signed without prejudice.

/s/ Allister A. Dredge
Allister A. Dredge
Marine Surveyor
N.A.M.S. - C.M.S.
S.A.M.S. - A.M.S.

[SEAL]

Photograph #1 :

Subject houseboat,
viewed looking toward the bedroom doors.

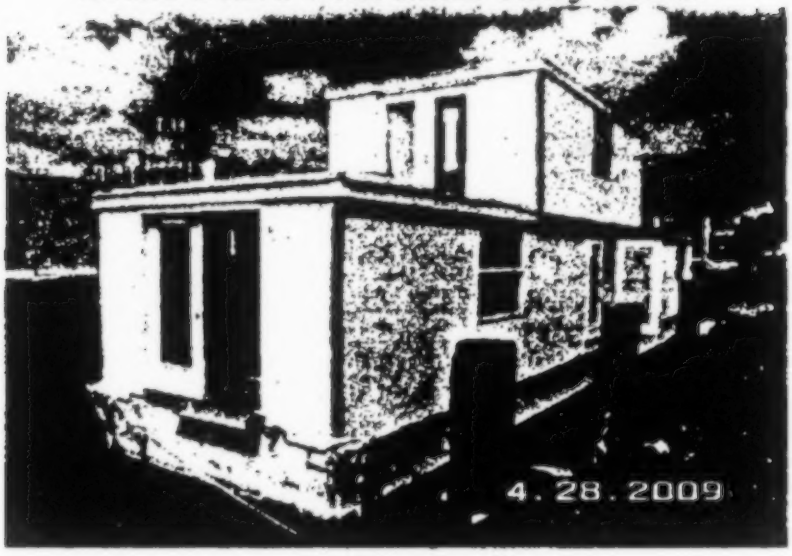


Photograph #2 :

Subject houseboat
looking toward the main living room entrance.

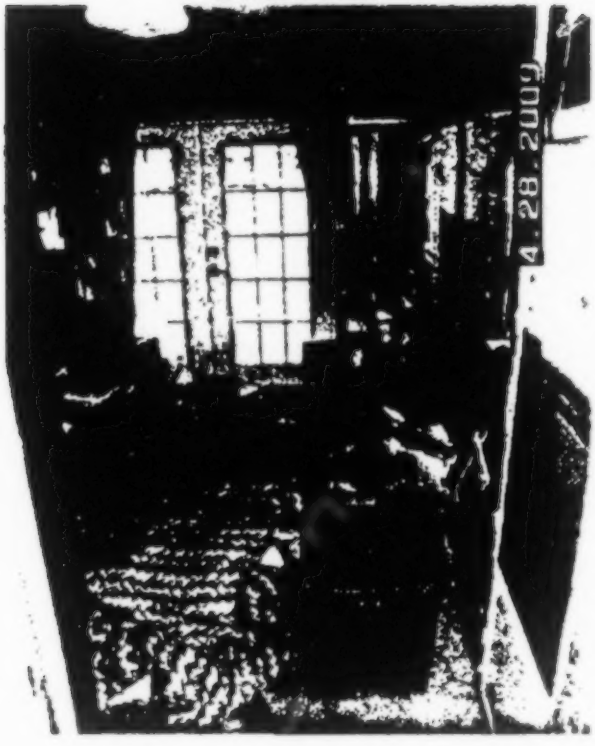
Photograph #3 :

General view of the front of the house board with main entry doors.



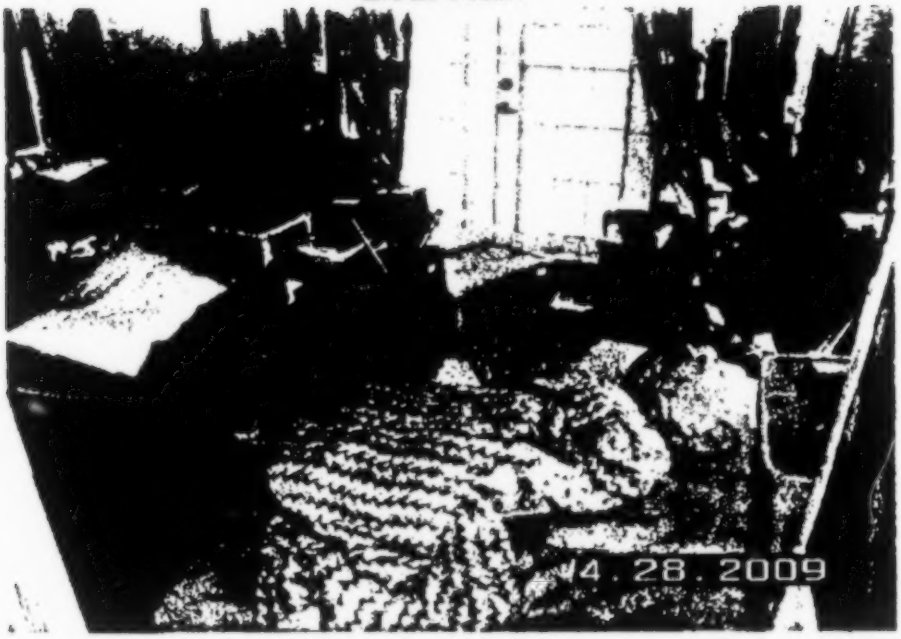
Photograph #4 :

Bedroom.



Photograph #5 :

Bedroom.

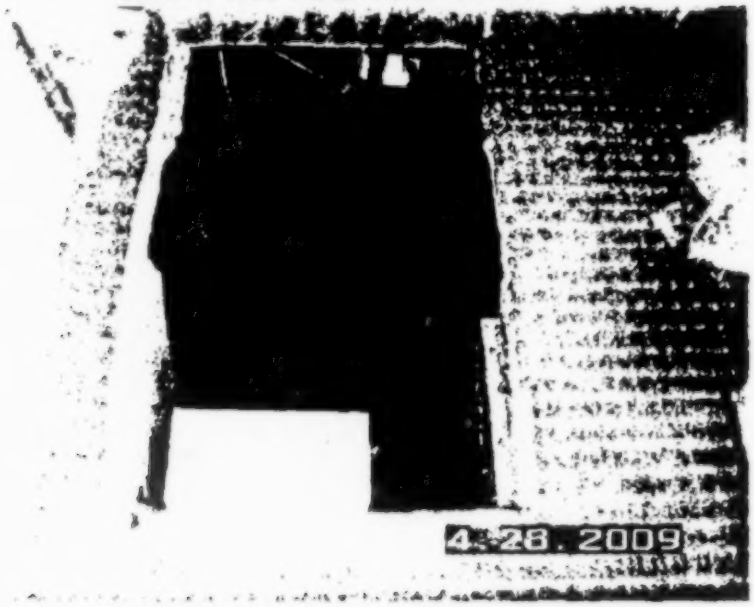


Photograph #6 :

Bedroom with access to the bilge compartment below the bedroom floor.

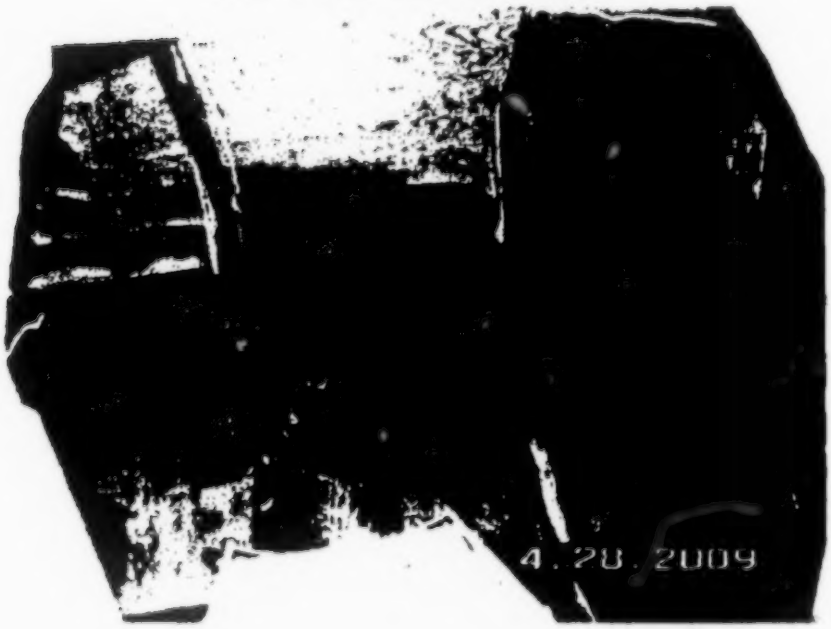
Photograph #7 :

View to show access to the bilge space
below the bedroom floor.



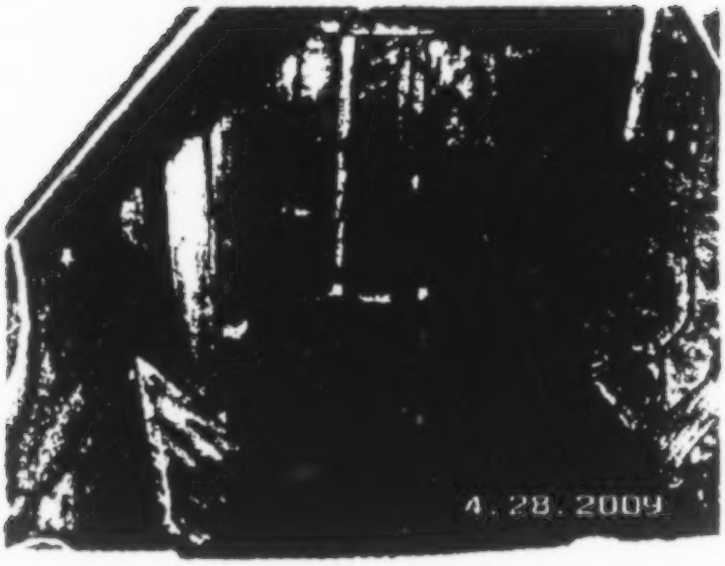
Photograph #8 :

View of the bilge area directly
below the access hatch.



Photograph #9 :

View of bilge compartment
below the bedroom floor.



Photograph #10 :

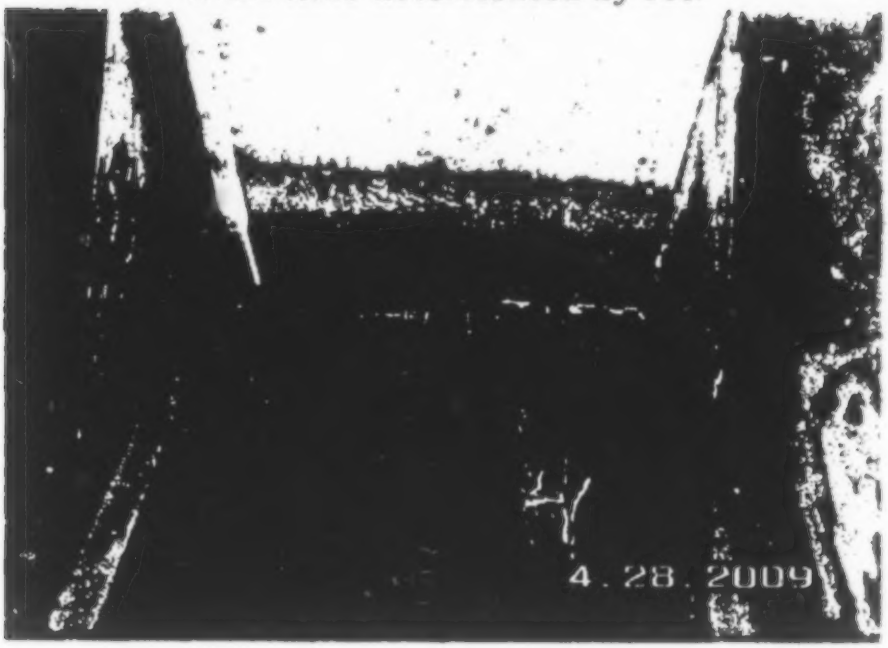
Water laying over the plywood bottom of the
structure located below the bedroom floor.

Photograph #11 :

Soft wood. Light pressure under-foot produced water from the saturated plywood.

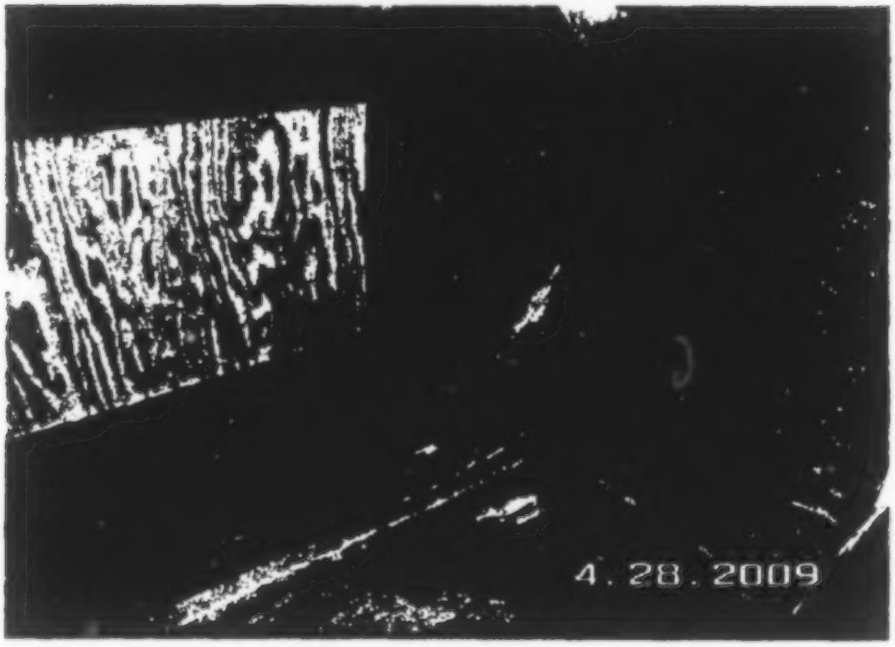
Photograph #12 :

Wood floor deteriorated by rot.



Photograph #13 :

Rot and damp wood.

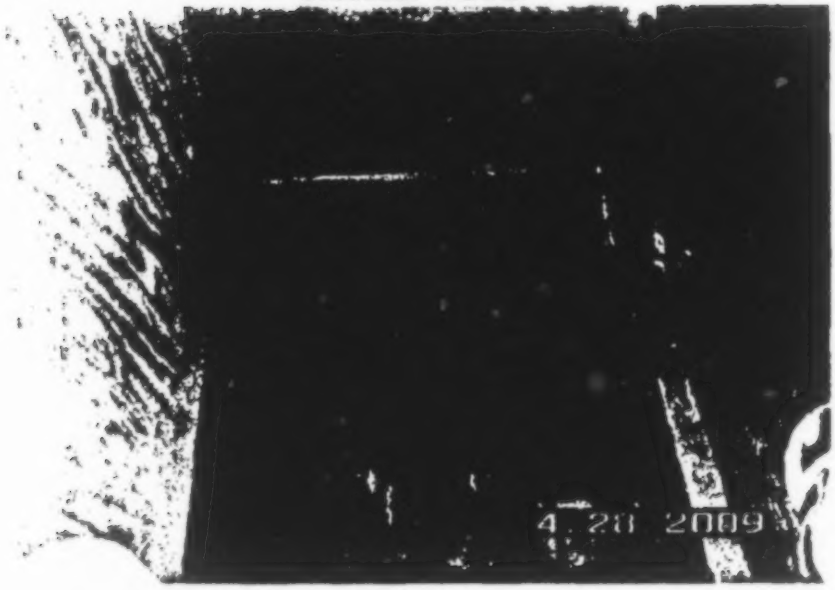


Photograph #14 :

Float switch, not in service.

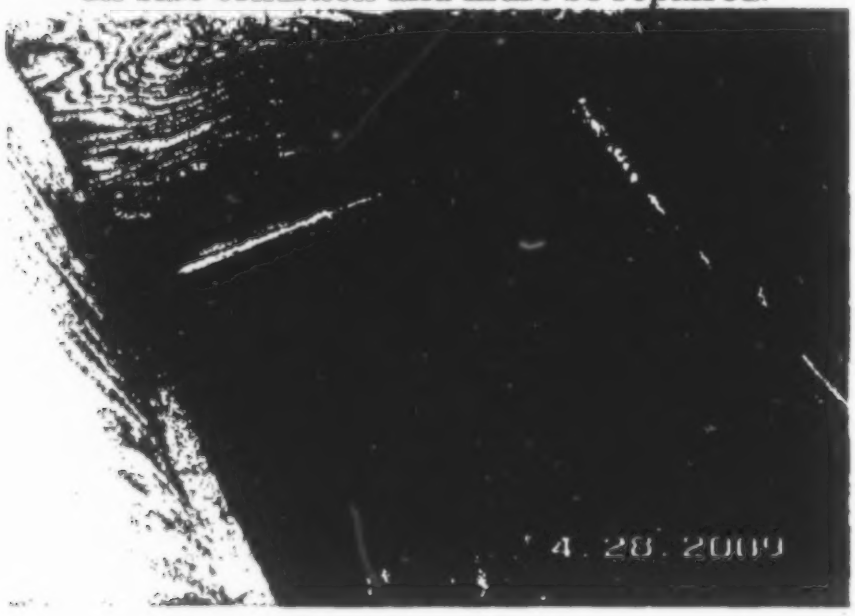
Photograph #15 :

Rotten wood.



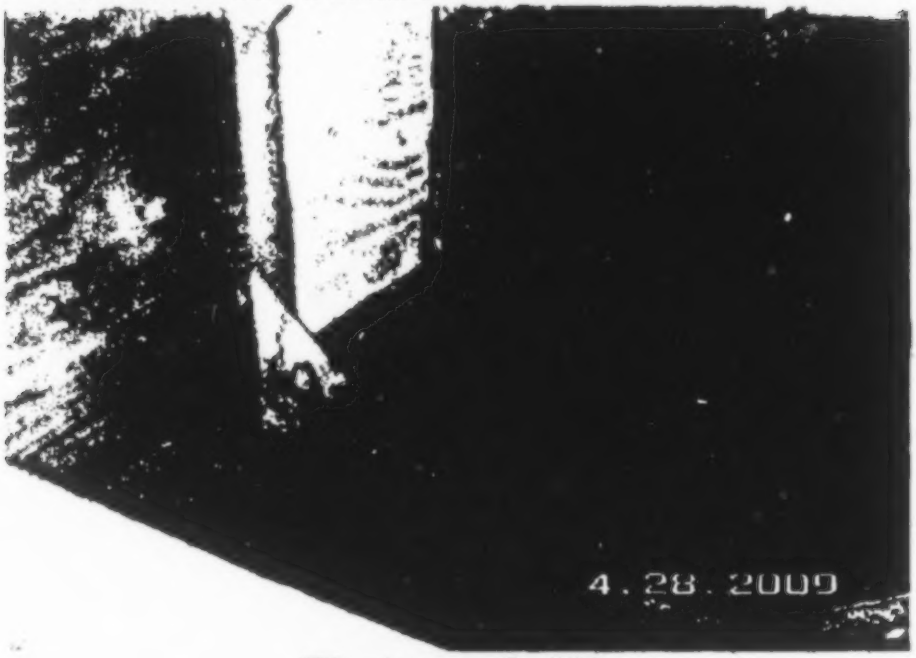
Photograph #16 :

Deteriorated wood comprising the bottom of the structure. The surface of the plywood was uneven & had de-bonded from the material below. This is an un-safe condition and must be repaired.



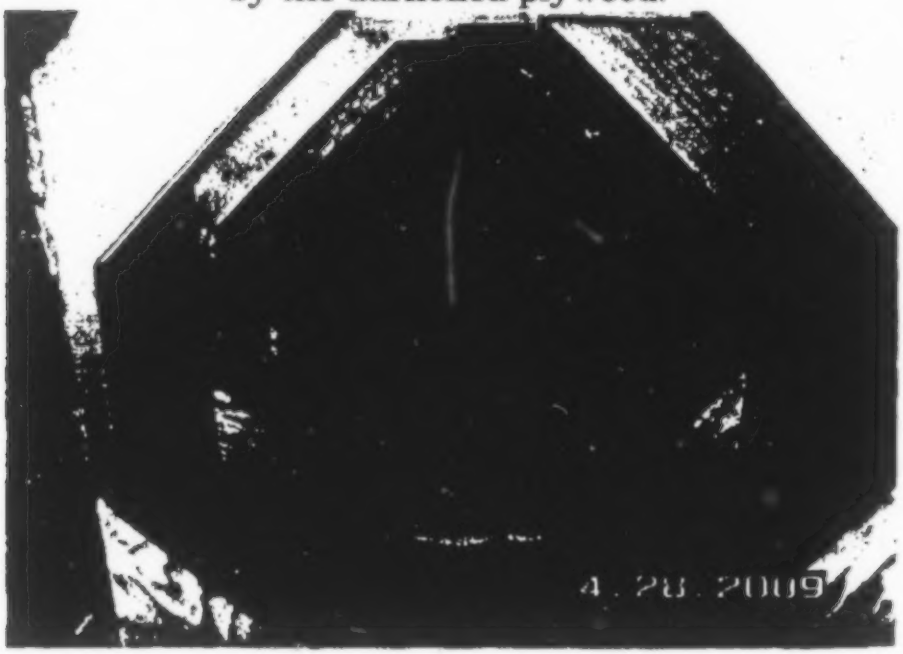
Photograph #17 :

Water on the wooden bottom of the structure.



Photograph #18

Note the damp wood brace identified by the darkened plywood.

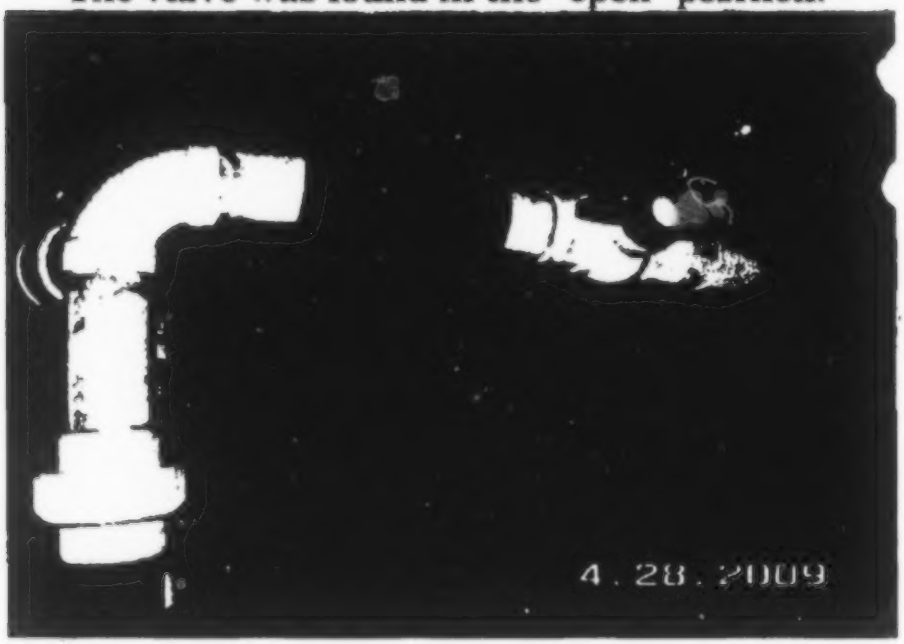


Photograph #19 :

Toilet and sink waste holding tank.

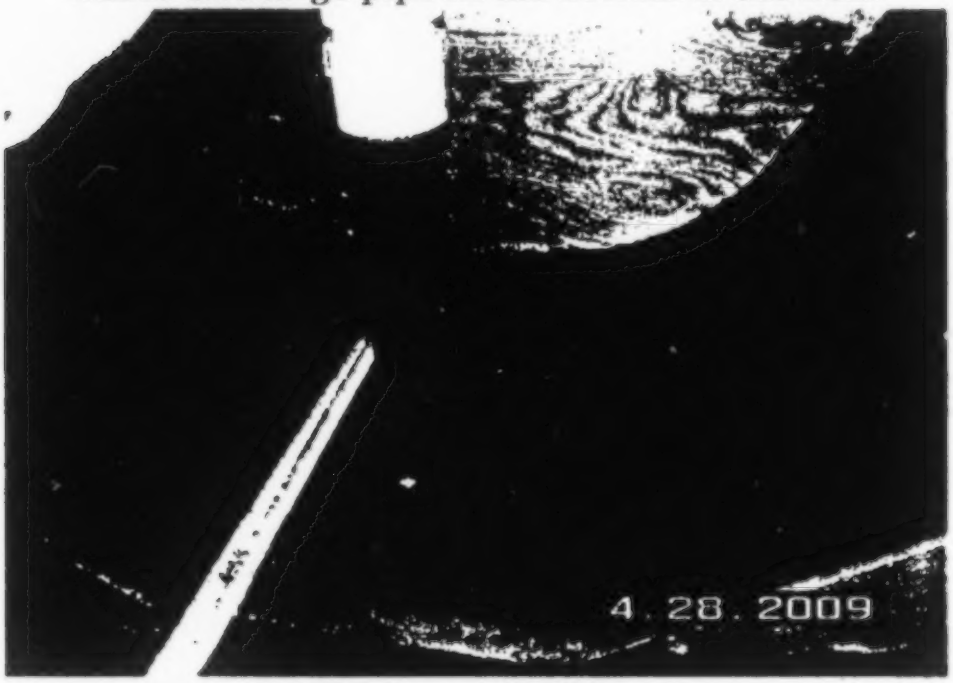
Photograph #20 :

This pipe was routed from the waste holding tank to discharge to waste through the bottom of the hull. The valve was found in the "open" position.



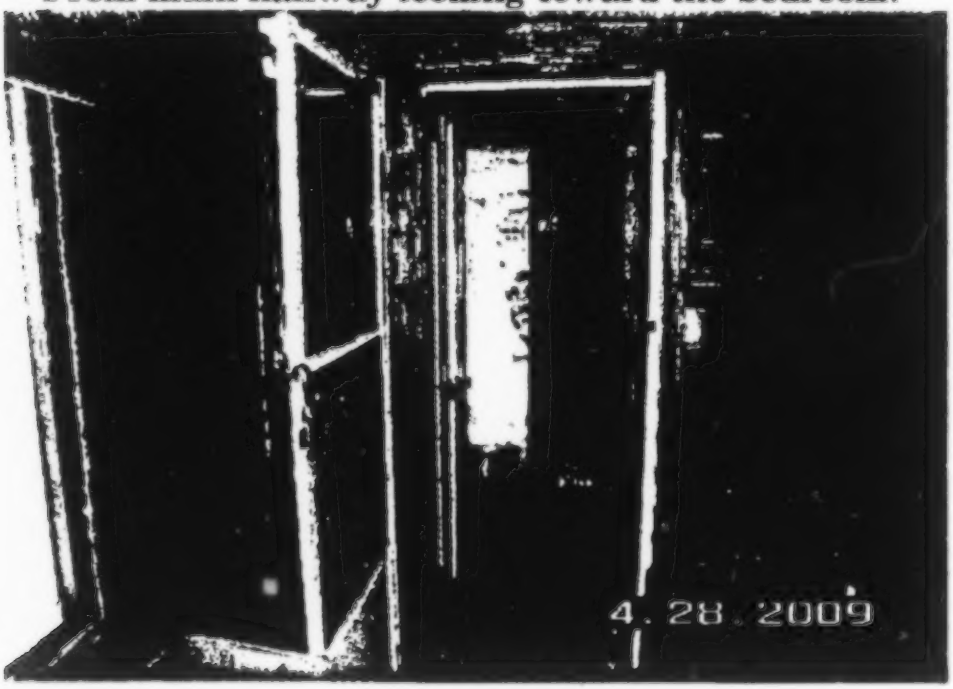
Photograph #21 :

Waste discharge pipe in the bottom of the hull.



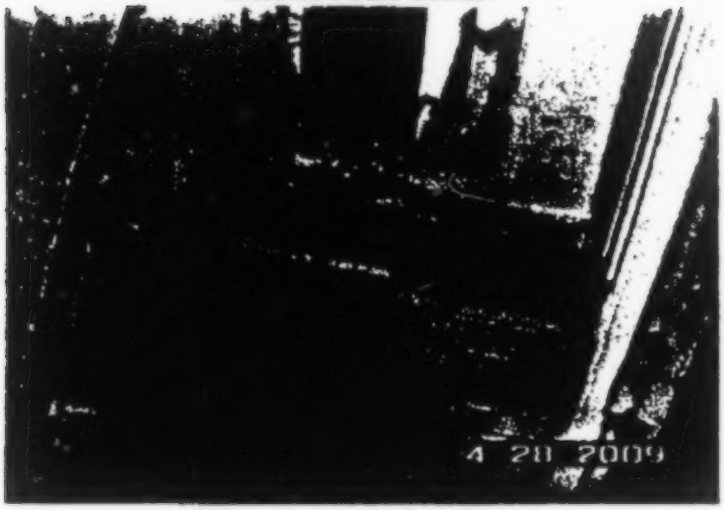
Photograph #22 :

From main hallway looking toward the bedroom.



Photograph #23 :

Bathroom sink.

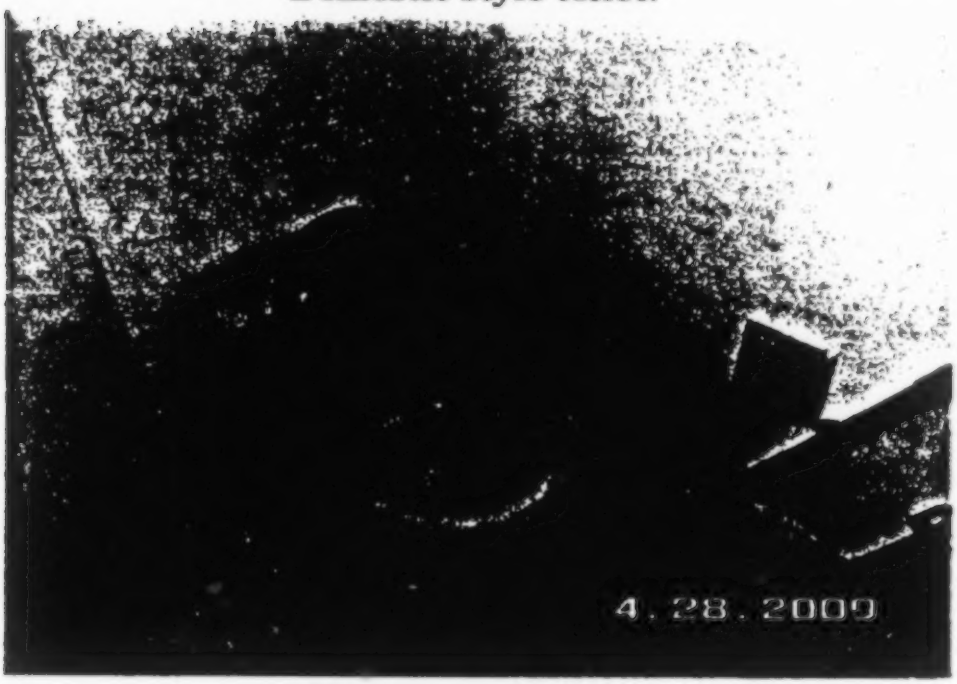


Photograph #24 :

From the bathroom hallway looking toward the main entry and living area. Note the discoloration to the ceiling.

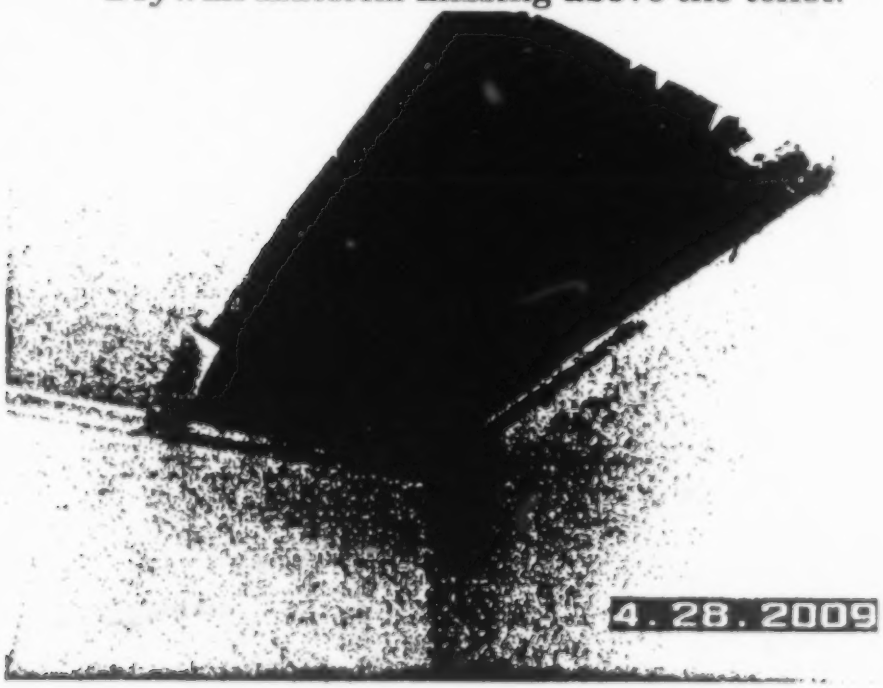
Photograph #25 :

Domestic style toilet.



Photograph #26 :

Drywall material missing above the toilet.

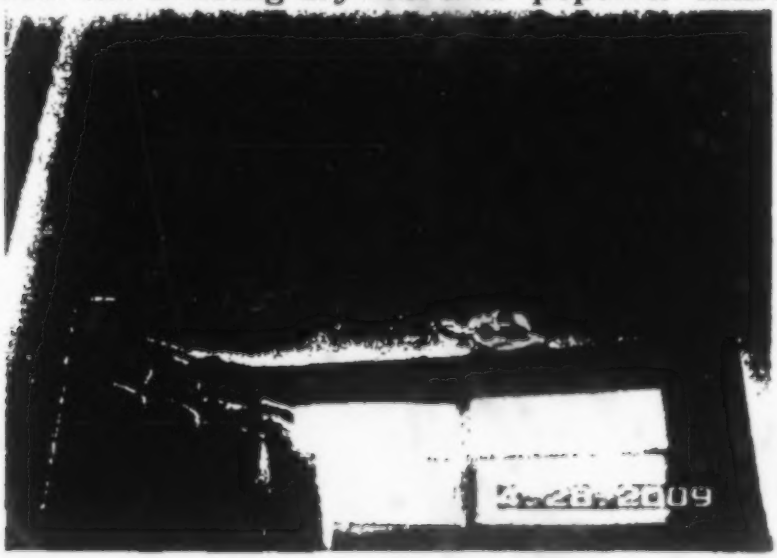


Photograph #27 :

Discoloration to the ceiling in the clothes storage room.

Photograph #28 :

Discoloration and hole in the ceiling in the clothes storage room. The aluminum foil had been placed under the missing drywall and "popcorn" finish.

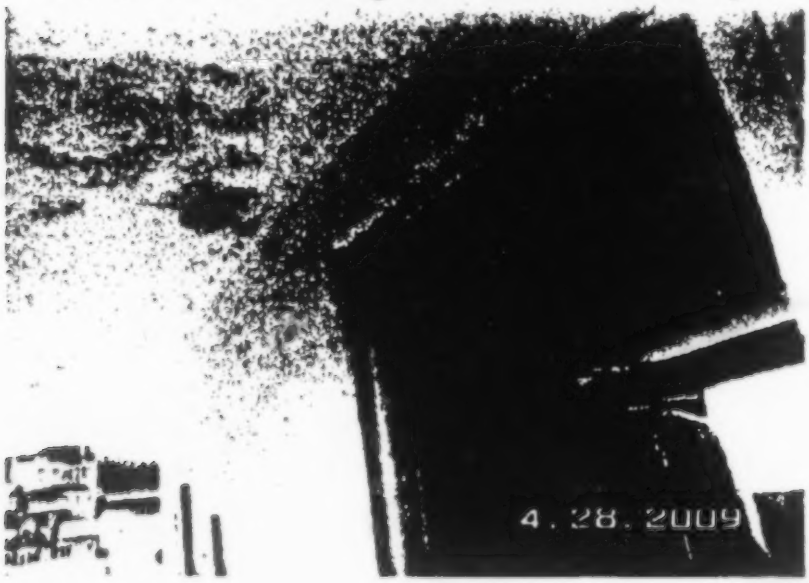


Photograph #29 :

Discoloration to the ceiling in the main hallway.

Photograph #30 :

Stains to the ceiling in the main hallway.

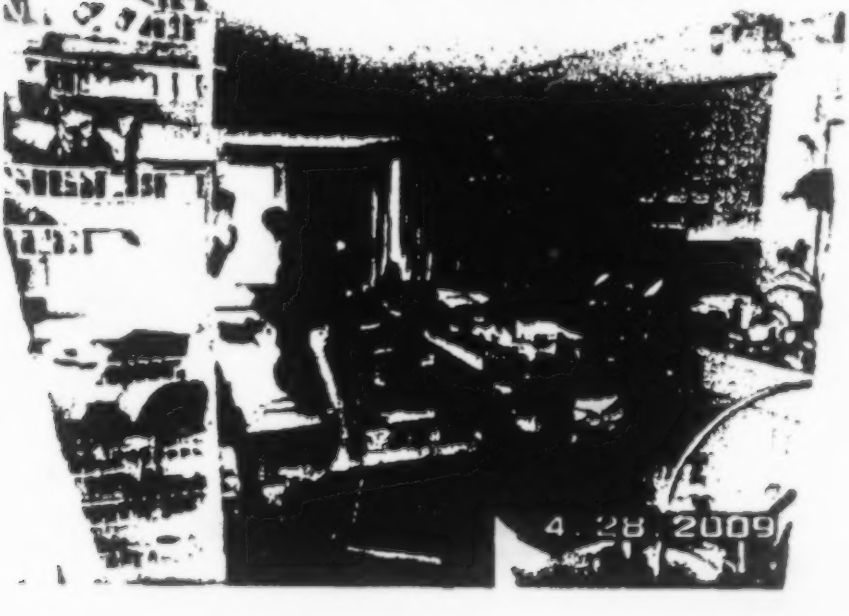


Photograph #31 :

Main switch panel for electric service.

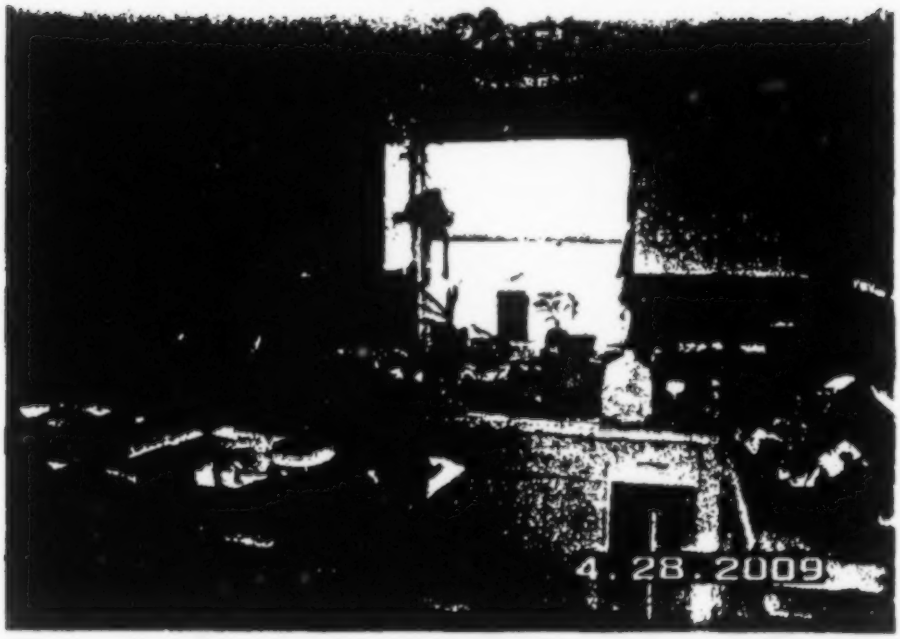
Photograph #32 :

Galley, dinette and main living area.



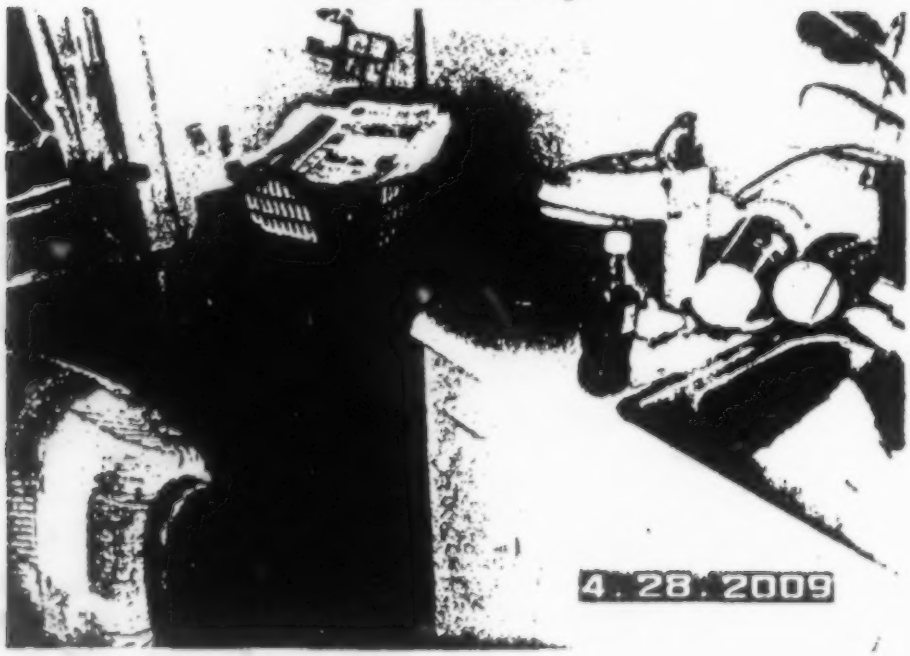
Photograph #33 :

Galley.



Photograph #34 :

Sink & cook top.

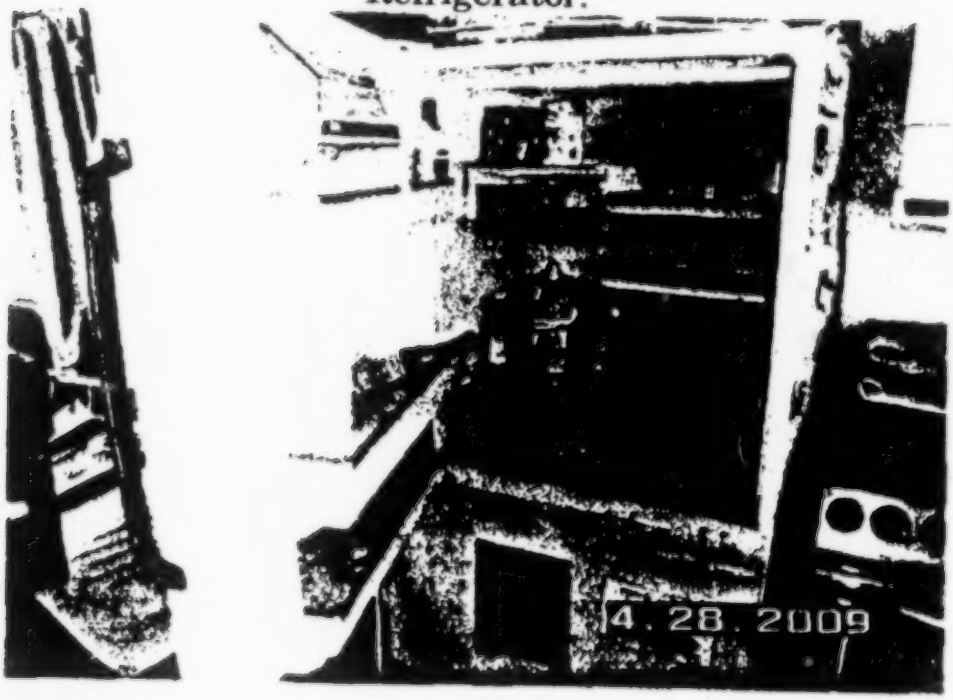


Photograph #35 :

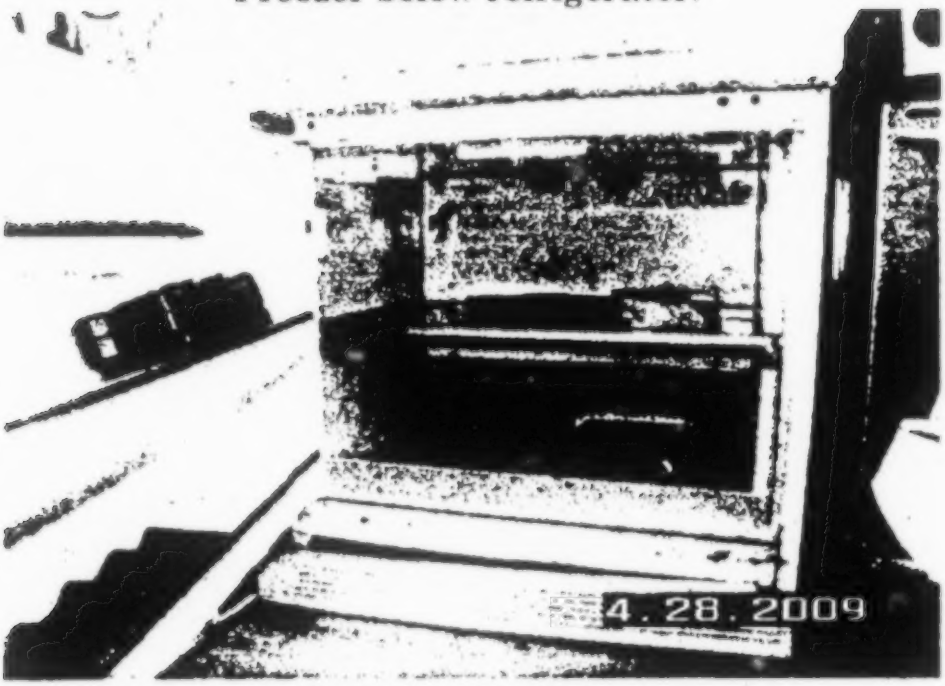
Cook top.

Photograph #36 :

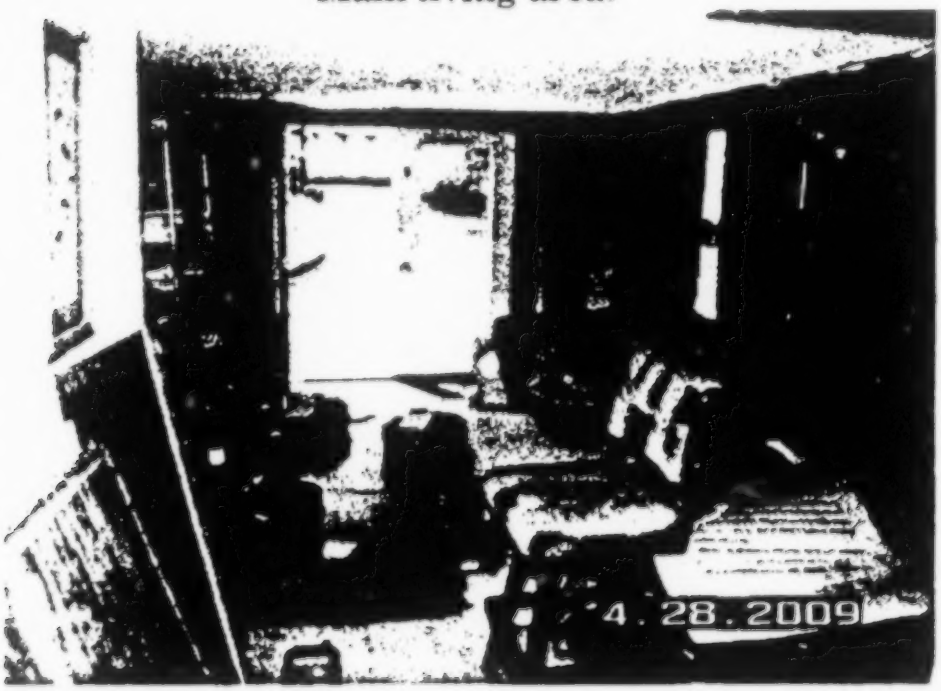
Refrigerator.



Photograph #37 :
Freezer below refrigerator.

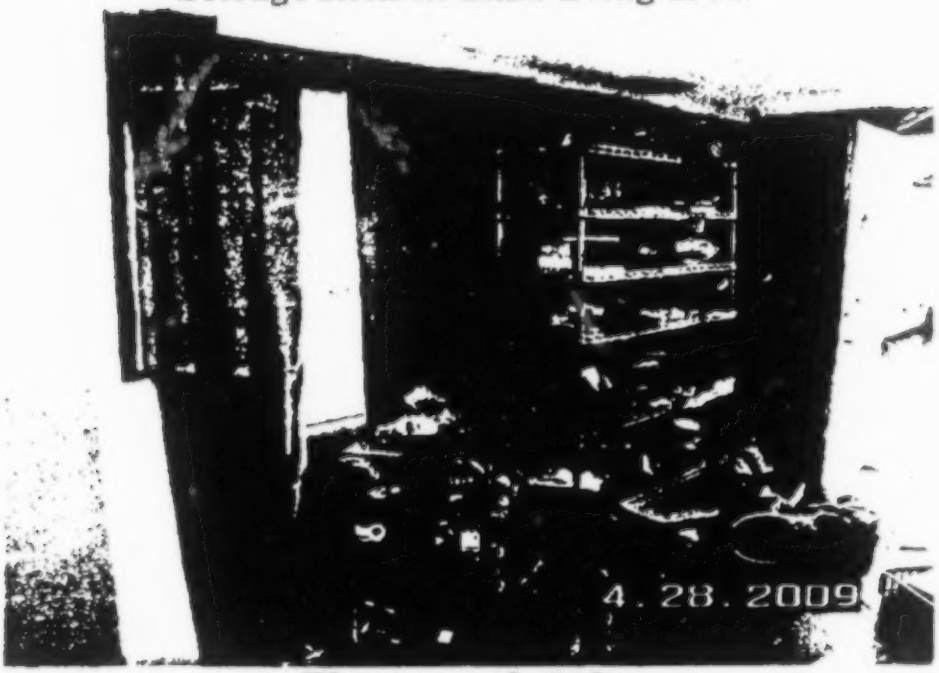


Photograph #38 :
Main living area.



Photograph #39 :

Storage shelf in main living area.

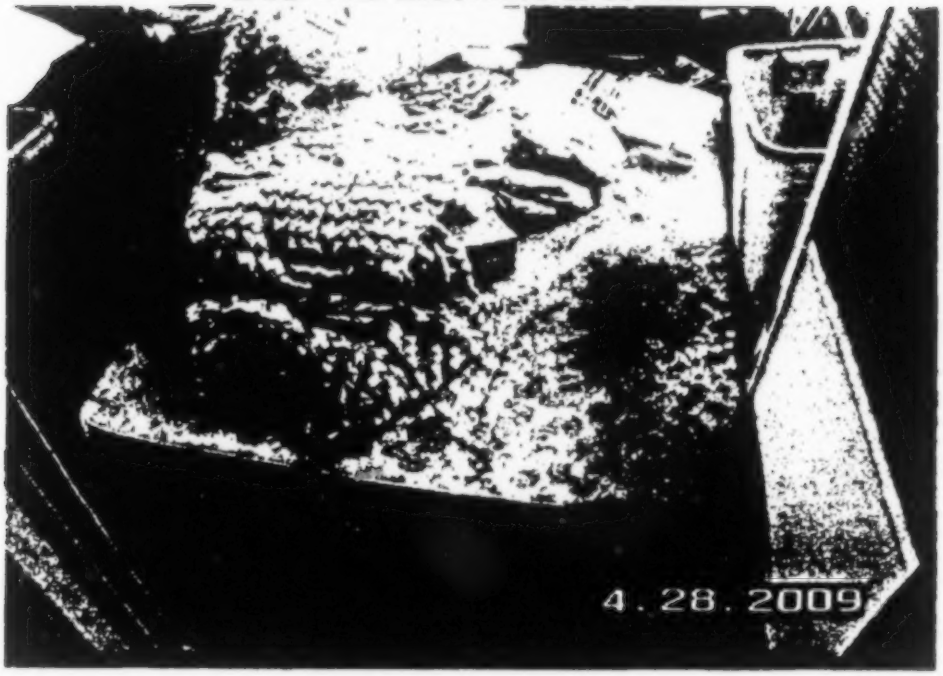


Photograph #40 :

Galley dinette looking from main living area.

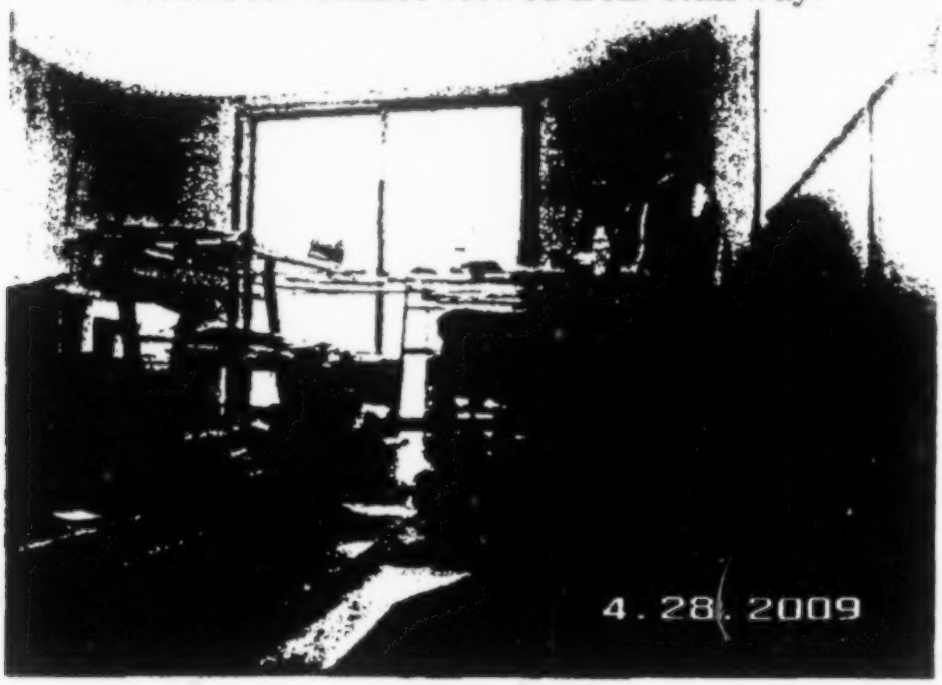
Photograph #41 :

Bedroom mattress & cover.



Photograph #42 :

Second level office viewed from stairway.

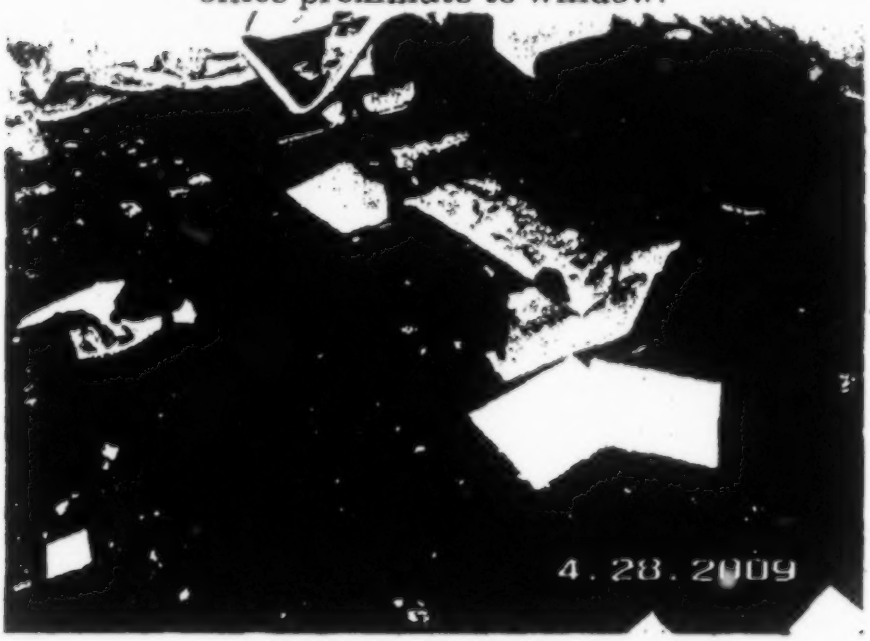


Photograph #43 :

Office. Feces on floor of second story office between chair and desk.

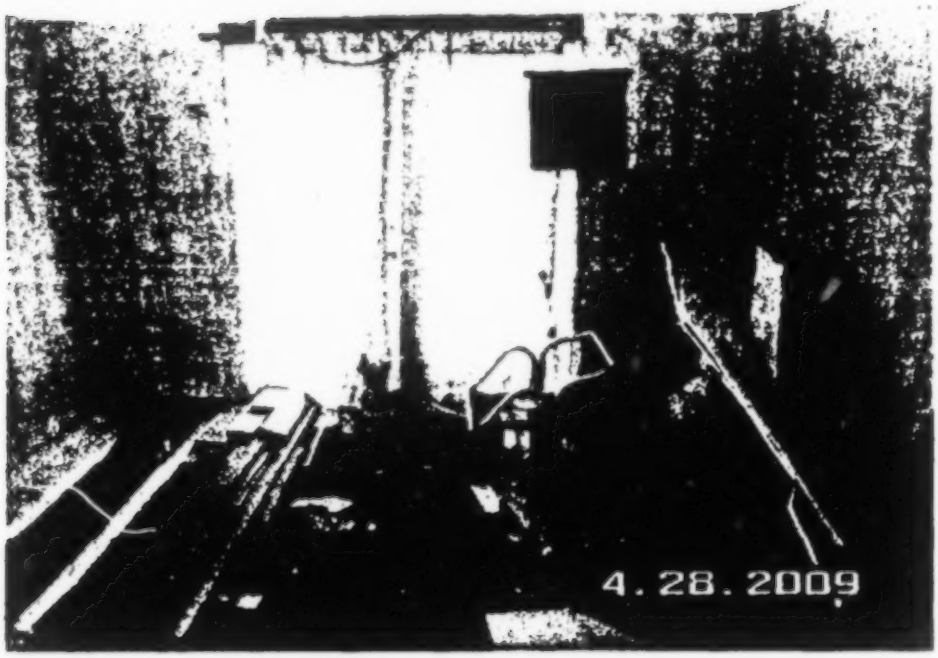
Photograph #44 :

Office floor. Feces on floor of second story office proximate to window.



Photograph #45 :

Office looking to window.



Photograph #46 :

Office.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed April 24, 2009]

"IN ADMIRALTY"

Case No. 09-80594-CIV-DIMITROULEAS

THE CITY OF RIVIERA BEACH,
Plaintiff,

vs.

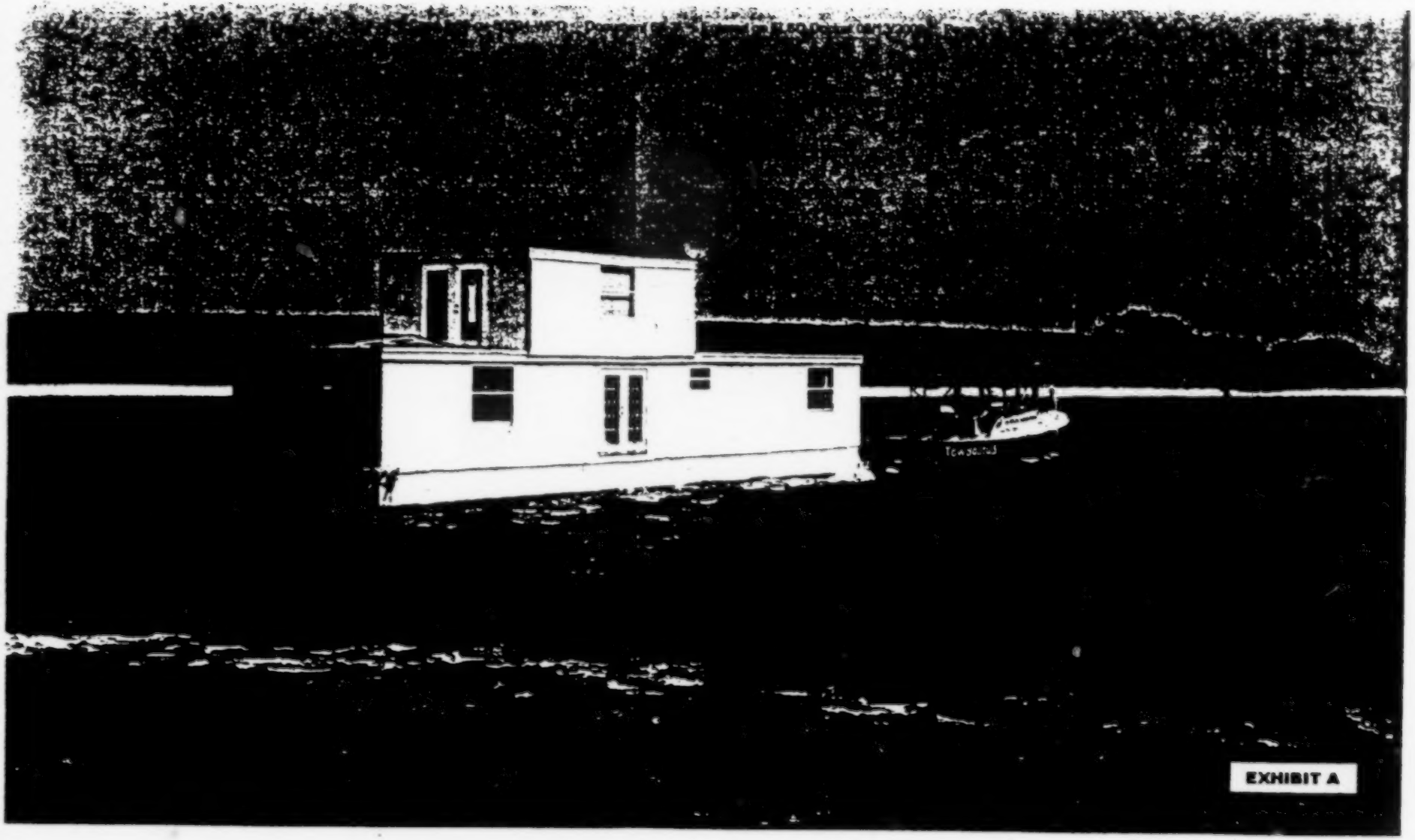
That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*,
Defendant.

Magistrate Judge Snow

ORDER MEMORIALIZING
RULINGS FROM BENCH

THIS CAUSE is before the Court upon the Defendant's Emergency Motion to Dismiss Plaintiff's Verified Complaint and Immediately Order the Return of Fane Lozman's Floating Structure/Primary Residence to the Riviera Beach City Marina [DE 9] and the Plaintiff's Emergency Motions for Authorizing Marine Survey [DE 10, 13]. The Court has carefully considered the Motions, the Plaintiff's Response to the Emergency Motion [DE 17], the parties' oral arguments at the hearing on Thursday, April 23, 2009, and is otherwise fully advised in the premises.

EXHIBIT A



[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 9:09-CV-60594-NPD

THE CITY OF RIVIERA BEACH,
Plaintiff,

vs.

THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, HER ENGINES, TACKLE, APPAREL, FURNITURE, EQUIPMENT AND ALL OTHER NECESSARIES APPERTAINING AND BELONGING IN REM,
Defendant.

---

150 Southeast Second Avenue
Miami, Florida
August 25, 2009
2:45 p.m.

VIDEOTAPED DEPOSITION OF FANE LOZMAN

---

* * *

Q Where did you take possession of the boat? [9] Where physically was it?

A On the west coast.

Q Was it in Fort Myers?

A It was somewhere around Fort Myers. I think east along a river that goes to Lake Okeechobee near Fort Myers.

Q And it says transfer is effective as of December 6th, 2002. So, you bought the boat in 2002.

A Yes.

Q And for a purchase price of $17,000?

A Yes.

Q Who towed the boat to North Bay Village?

A I don't recall.

Q Do you have any documents on board the defendant vessel that would help you remember?

A I don't know.

Q Do you remember when the boat was towed?

A It was towed a few weeks after it was purchased, three to four weeks later.

Q So, three to four weeks after you bought the boat you moved it from the west coast somewhere near Fort Myers to North Bay Village, Florida?

A That's correct.

Q How many miles was that?

A I don't know.

[10] Q When you say North Bay Village, is that a marina?

A That's a city.

Q That has a marina?

A It has a number of marinas.

Q So, did you keep the vessel at a marina in North Bay Village?

A Yes.

Q Where?

A It was at the Bayshore Yacht and Tennis Club.

Q Bayshore Yacht and Tennis Club, is that a private or a public facility?

A Private.

Q Did you use that address as your residence?

A I used the marina address as my residence, yes.

Q So, that was in 2003?

A Yes.

Q How long did you stay at North Bay Village?

A Until after Hurricane Wilma.

Q I don't recall when that was. Do you?

A The transition after Wilma where the boat, in early 2006, was moved to Riviera Beach.

Q Okay. So, approximately from 2003 to 2006 the vessel was in North Bay Village?

[11] A Yes.

Q Do you have copies of any contracts, or leases, or dockage agreements from the time that the boat was in North Bay Village?

A Not—not handy, no.

Q Do you have them at all or do you know where they are?

A There may be some on the defendant vessel, I really don't know. I don't know if I have that material anymore.

Q What was the reason for leaving North Bay Village and coming to Riviera?

A Hurricane Wilma destroyed the marinas in North Bay Village and the city condemned the properties.

Q Did the vessel suffer any damage?

A No. Uh, can I rephrase that or re-answer that? In Hurricane Katrina it had—a hole had been knocked on the second story, minor damage on the second story. Something had hit it.

Q And that was Katrina, but Wilma was the one that damaged the marinas in North Bay; is that what you said?

A Wilma got the marinas condemned. They had been damaged in Katrina where they had been issued with a violation of whatever.

[12] Q How far is North Bay Village where the boat was to Riviera Beach?

A Maybe 60 miles, I am guessing. By water.

Q How did you get the defendant vessel from North Bay to Riviera?

A Towed it up there.

Q I am assuming that if the marina had been damaged so bad that it would be condemned, were you still tied to a dock?

Was the vessel still tied to a dock in North Bay when you decided to move it or were you at anchor? Where was the vessel after all of these hurricanes?

A The docks weren't around anymore. The docks had been destroyed. The vessel was tied to different pilings.

Q The vessel was just tied to pilings?

A The vessel was tied to pilings.

Q So, there was no dock that the vessel was against after those hurricanes?

A No.

Q How did you get from the defendant vessel to shore?

A Kayak, little boat.

Q How far was that?

A Fifty to 75 feet, maybe.

[13] Q So, you had the vessel towed from North Bay to Riviera in 2006 sometime. Who towed the vessel up?

A I did.

Q How did you do that?

A I borrowed a friend's speed boat and pulled up there.

Q What kind of speed boat was it?

A A Scarab.

Q How big a boat was that?

A Thirty something, a 30-foot. Thirty some-odd feet.

Q Who was the friend?

A Bogus Milsky, Mr. Bogus Milsky.

Q Bogus is spelled B-o-g-u-s?

A I am not sure how his name is spelled.

Q Where does Mr. Milsky live?

A He lives in Miami Beach.

Q Do you still keep in touch with him?

A Occasionally.

Q Do you have his address?

A No, I don't.

Q Phone number?

A Not on me.

Q Is it accessible, his phone number?

A It should be.

[14] Q How long did it take you towing the defendant vessel up to Riviera with the Scarab, Mr. Milsky's Scarab?

A Eighteen to 20 hours.

Q And had you had a lot of communication with Riviera Beach before you moved it up from North Bay Village?

A I had some.

Q When you say some, in what kind of nature was that communication?

A I had visited the facility and showed them a photograph of the defendant vessel. Met with the marina director. Identified a spot that it would be tied up to.

Q The marina—

A Pulled out the lease agreement.

Q Okay. The marina director was who?

A George Carter.

Q Is he still the marina director at Riviera Beach?

A No.

Q Did you have any problems with the management of the marina at North Bay Village where the vessel was before you came to Riviera Beach?

A Yes.

[15] Q What kind of problems did you have?

A They were a fellow residential home tenant was being denied access to have a wheelchair ramp placed on the dock.

Q And this affected you how?

A This gentleman was a friend of mine and I was the one who was paying for the wheelchair ramp.

Q You were paying for the wheelchair ramp?

A Yes.

Q Why were you doing that?

A Because my friend couldn't afford to pay for it.

Q And so, what was the problem?

A The marina owner did not want the wheelchair ramp on his dock.

Q Okay. And again, I am not seeing what the problem was. How did you solve the problem, or did you solve the problem?

A There was quite a public battle in the media, and it resulted in an eviction.

Q It resulted in an eviction?

A Or an eviction proceeding.

Q Of whom?

A Of both of us,

Q And the eviction proceeding, do you know when [16] that took place?

A Sometime in '03. I don't know if it actually proceeded—let me step back. The eviction—I am not sure if the eviction started or it was threatened, but the result was relative to myself, I moved to a different marina in Riviera Beach while the older gentleman, he decided to fight the eviction proceeding.

Q Let me get this straight. Before all of the docks were condemned and you moved because of that, but now you were actually going to move anyway; am I hearing that right?

A I moved to a different marina in North Bay Village.

Q In North Bay Village?

A That's correct.

Q So, you actually stayed in more than one marina in North Bay Village. Can you name the first one and then the second one so we are clear?

A Right. The Gator, Gator Marina.

Q Was the first one or the—

A The second one. The first one was Bayshore Yacht and Tennis Club. The second one was the Gator Marina.

Q Any problems at the Gator Marina?

A Yes.

[17] Q Can you tell me what kind of problems?

A Gator had two marinas, and the first marina, they sold it, so all the house—all the floating residential structures and boats moved to the second Gator marina.

Q How many, just for lack of a better term, how many houseboats are you talking about when you say—

A Maybe 30. Forty-five to 30.

Q And then after everyone moved there, around what time was this big move from one Gator Marina to the other?

A Maybe '04.

Q Then the hurricanes come and you say the docks were all destroyed?

A Docks were destroyed in all the marinas in Bayshore and Gators Marina in October 2005, correct.

Q. And what happened to all of those houseboats, residential structures, whatever you want to call them?

A Ninety-five percent of them were destroyed.

Q But not yours?

A That's correct, I was on the north side of the—of all the docks. The northernmost docks and all the docks south, all the boats were destroyed.

* * *

EXHIBIT A

[Logo] Qest International, Inc.
P.O. Box 50441
Ft. Myers, Fl. 33994

BILL OF SALE

Qest International, Inc. ("Seller"), of P.O. Box 50441, Ft. Myers, Fl. 33994, USA, does hereby sell, assign and transfer to Fane B. Lozman ("Buyer"), of 601 E 32nd Street, Unit 811, Chicago, Ill. 60616, USA, the following property.

PROPERTY; Homemade Custom Houseboat/Barge
IDENTIFICATION NUMBER: 62' x 14'
AMOUNT: $17,000.00

Seller warrants that the property is being transferred to Buyer free and clear of any liens and encumbrances.

The above property is being sold on an "as is" basis. The Seller makes no warranties, express or implied (except as specifically stated above).

The transfer is effective as of December 6, 2002.

Qest International, Inc.
By: /s/ [Illegible]

Fane B. Lozman
By: /s/ Fane Lozman

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-80594-CIV-WPD

THE CITY OF RIVIERA BEACH,
Plaintiff,

v

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining) and belonging *in rem*,
Defendant.

Fort Lauderdale, Florida
November 23, 2009
9:05 a.m.

VOLUME 1

TRANSCRIPT OF NON-JURY TRIAL PROCEEDINGS

BEFORE THE HONORABLE
WILLIAM P. DIMITROULEAS

U.S. DISTRICT JUDGE

* * * *

[142] Williams – Direct

junk like some other boats at the marina?

MR. BIRTHISEL: Relevance.

THE COURT: Sustained.

MR. LOZMAN: Nothing further for this witness. I am going to call my next witness.

THE COURT: We got to give the City an opportunity to cross examine if they want.

MR. BIRTHISEL: Nothing from the City, Your Honor.

THE COURT: Thank you, Mr. Williams. You may step down and you are excused.

(Witness complies.)

THE COURT: Mr. Lozman, you may call your next witness.

JEFF POWELL, DEFENDANT'S WITNESS, SWORN.

THE COURT: Please state your full name and spell your last name for the record.

THE WITNESS: I am Jeff Powell, P-o-w-e-l-l.

MR. LOZMAN: I would like to introduce Defendant's Exhibits 61 and 62, Your Honor – excuse me – 51 and 52.

(Pause.)

THE COURT: Are you moving 51 and 52 –

MR. LOZMAN: I would like to move to 51 and 52 into evidence.

THE COURT: Mr. Birthisel, what's your position on 51 and 52?

[143] MR. BIRTHISEL: No objection, Your Honor.

THE COURT: All right. 51 and 52 will be received. (Defendant's Exhibits 51 and 52 were marked in evidence.)

DIRECT EXAMINATION

BY MR. LOZMAN:

Q. Mr. Powell, what's your current occupation?

A. I am a state certified building contractor and roofing contractor.

Q. How many years, sir, have you been a certified building contractor?

A. Since 1981.

Q. Defendant's Exhibit 51 shows a registration from the Department of Business and Professional Regulation for both roofing contractor and certified building contractor.

Are those your – are you number – are those your credentials on that document?

A. Yes, they are.

Q. Okay.

Prior to becoming a roofing – both a roofing contractor and also a certified building contractor, were you also a boat captain?

A. That occurred ten or twelve years – after I started building work I was an operator of a 95-foot passenger vessel, Coast Guard licensed, that operated out of Miami and we did like tours to the Bahamas and local. So I was part of the [144] corporation and I was the third man.

Q. Thank you.

So you were a boat captain of a 90-plus foot vessel, a dive boat, is that correct?

A. Yes.

I was the operator. I wasn't strictly the captain. I was Coast Guard licensed as one of the deck hands.

Q. Okay.

Were you also a captain?

A. I operated the vessel continuously. But for economic reasons we always hired a second captain, because once we left the dock we had to have two people on board that could operate the vessel.

Q. Did you have an ownership interest in that boat?

A. Yes, I did.

Q. I have here on Defendant's Exhibit 51 it says: Date required 3/16 to 3/17/2006.

On March 16th and March 17th you worked for me. What did you do on those two dates?

A. I assisted in transporting this floating home vessel slash arrangement with two boats that were being towed.

I was also on board with equipment and materials in case there was any issues towing the vessel – houseboat.

Q. Okay.

Now, it says here: Provide, assist, tow boat and [145] navigation for 70-nautical-mile trip to the Intracoastal.

You charged me $100 an hour for 18 hours plus fuel and costs.

$1,800, is that accurate?

A. Yes.

Q. Now, you weren't – explain to the Court were you in the tow boat?

I mean were you in the boat pulling this thing or were you in a boat behind my floating home?

A. I was in the assist boat at the rear of the floating home.

Q. Okay.

Why – you know – why would I have to spend $1,800 – let me step back.

Why does a floating home need a boat in the front and a boat in the back?

MR. BIRTHISEL: Your Honor, I am going to object on relevance. This is more of the same vessel thing that we have been through and been through and been through and been through.

Even these invoices themselves refer to it as a boat. The witness himself is having a difficult time distinguishing between it being a vessel.

THE COURT: Try not to have speaking objections.

MR. BIRTHISEL: I am sorry, Your Honor.

[146] MR. LOZMAN: Objection.

THE COURT: I sustain Mr. Birthisel's objection.

Q. Did you see my floating home in North Bay Village, Florida, prior to Hurricane Katrina and Wilma and immediately after Hurricane Katrina and Wilma?

A. Yes.

Q. Did it sustain any damage?

A. No.

Q. When I purchased my floating home in 2003, did I contract with you to do the following: Did I contract with you to put a new roof on?

A. Yes.

Q. Did I contract with you to put plumbing, electrical, five new windows, sewage pump system and air conditioning duct in my floating home?

A. That's correct.

Q. Why would I do that?

Why would I contract with a Florida building contractor to do these repairs?

A. You were forced to –

MR. BIRTHISEL: Your Honor, relevance. He is asking him why he would do that.

THE COURT: Sustained.

Q. Why is it necessary for a floating homeowner to hire a licensed building contractor to do those repairs?

[147] MR. BIRTHISEL: Objection. He is asking for an opinion now as well.

THE COURT: I will allow him to give the opinion.

You can answer.

A. At the time that the floating homes were in North Bay Village, an agent of the City, Bob Pushkin (phonetic), came and red tagged the work and stated that it had to be done by a certified building contractor according to Florida building code because it was a floating home.

MR. BIRTHISEL: And, Your Honor, I move to strike that response. I mean what does this have to do again with the relevance of this case?

THE COURT: I have already ruled that it is a vessel that –

MR. LOZMAN: Can I address the Court for a moment?

THE COURT: You are asking questions now.

MR. LOZMAN: Okay.

Q. Here is a very important question to ask: You know, when I contracted with you, you know, earlier in the month of March, 2006, to tow that, to tow my floating home, isn't it true that your comment was: There is no brackets to tow that. We have to build some brackets to have something to pull it with?

MR. BIRTHISEL: Objection. Relevance.

THE COURT: Overruled.

Q. Answer the question, please.

[148] A. The structure of the floating home needs to be reinforced. And custom towing brackets were welded to our design. And one of my workers went into the structure of the boat, reinforced the corners, and installed four large towing bits. There was none on the floating home at that time that would sustain towing of that distance.

Q. In your experience as a ship captain on the ships that you have operated, have you ever seen a ship that was built without some kind of cleats to tow it?

A. No.

There was no adequate –

Q. I am talking about in a ship in general, not my floating home.

Have you ever – you are a former ship captain. Have you ever been on any ships – even the boats that you owned – did you ever see a ship that didn't have the capability to be towed?

A. No. I have never seen a large vessel boat that did not have cleats for ropes and tie ons, et cetera.

Q. Have you ever seen any vessel – whether it's any registered vessel – that cannot be towed?

That's my question.

A. No.

MR. BIRTHISEL: The same relevance objection, Your Honor.

[149] THE COURT: Overruled.

Q. So don't you think it's straining that – okay. I take that back.

If you had not fabricated – you and your men had not fabricated those cleats, is it accurate to say there was no way that floating home could be towed even five feet?

A. No. It would not be safe to tow it, the light duty construction of a floating home.

Q. That's not my question.

I am saying there would be no way to physically tow it five feet until you put those corner brackets on, is that correct?

A. Correct.

Q. Okay.

I am now going to talk about D52.

Now, this is another bill from you dated August 19, 2006. It says: Provide consulting and supervision of repairs to houseboat, provide supervision of Jonathan – I can't read your writing – Jonathan something – work 15 hours – it says: For repairs to walls and roof.

Okay.

Do you recall this invoice from August 19, 2006?

A. Yes.

Q. Okay.

Why was it necessary to have a roofing contractor come [150] and repair a roof on my floating home?

A. Because of the Florida building code.

Q. Great.

MR. LOZMAN: Now I would like to move into evidence Defendant's Exhibit D31.

MR. BIRTHISEL: No objection, Your Honor.

THE COURT: 31 will be received.

(Defendant's Exhibit D31 was marked in evidence.)

Q. What is that white type (phonetic) and hose that is coming out of my floating home directly in front of the ramp?

MR. BIRTHISEL: Objection, Your Honor.

Could we lay a foundation on this as to what it is, if he recognized it, rather than just going right to the, you know, what is that on my floating home and leading again?

THE COURT: It's been admitted into evidence. He can publish it however he wants.

Overruled.

A. At the rear of the floating home is this two-inch PVC black water pipe, and there is a flexible hose that goes to a continuously operating sewer system at the marina.

Q. At – let me see – so that sewer pipe stays on there 24 hours a day, is that correct?

A. Yes.

It's required at all marinas.

Q. Okay. That's all.

[151] I just want to ask how many hours it stays on.

Here is a question: In the process of supervising your men who were putting in the corner brackets shortly before we came to Riviera – shortly before my floating home came to Riviera Beach, how many compartments in the bilge would you estimate there were?

A. This type of typical floating home construction has like 30, 28 compartments. It's subdivided so that if one, say, watertight box is punctured, that it won't flood the whole place at the water line and cause the floating home to sink.

Q. So your testimony is maybe there was 30 compartments in the bilge of my floating home?

A. Yes. Very close to that number.

Q. Okay.

Now, in your experience as a ship owner and – have you ever seen a vessel that has 40 different watertight compartments that's only 60 feet long?

MR. BIRTHISEL: Objection, Your Honor.

He identified this witness, I believe, or attempted to identify this witness after the deadline as an expert. He is continuing to go down that road here by not laying the foundation properly and just generally throwing out this stuff about the vessel without asking him any questions as to what his qualifications are. He captained a 95-foot boat. He has not talked about any marine surveying capabilities, no [152] education and training whatsoever. He has failed to establish the proper predicate to ask this witness those types of questions.

MR. LOZMAN: Your Honor, I did. We talked about he has been a building contractor for 25 years, he has been a ship captain, he has been on numerous boats, he has owned numerous boats. He can talk about the work he has done to my boat. He can talk about how that compares to other boats. Nothing is secret about it.

THE COURT: I sustain the objection.

Q. Relative to a floating home, which you are well aware of because only licensed building contractors in Florida can work on floating homes – I have got a question: Have you ever repaired any other floating homes in your career, i.e., (unintelligible)?

A. Yes.

Q. Okay.

So I am just laying a foundation.

You have done work on other floating homes in South Florida in your experience as a building contractor?

A. Yes.

Q. In your experience of working on floating homes, isn't the reason you have 30, 40, 50 watertight compartments because floating homes hulls that are built out of plywood leak and create havoc with water intrusion?

[153] MR. BIRTHISEL: Your Honor, again he is asking for essentially a naval architect's opinion here at this point.

He has referred to it as a bilge. I have never heard of a home having a bilge in it, first of all. But let's just assume for the purposes of this that there is a bilge. This witness isn't qualified to testify to this.

THE COURT: Sustained.

MR. LOZMAN: Your Honor, can I make a comment before you sustain that?

THE COURT: I have sustained it.

You can make a comment after I have sustained it.

MR. LOZMAN: Okay.

My comment, sir, is that naval architects don't build floating homes, marine technicians don't work on floating homes.

In the State of Florida only a licensed building contractor can work on a floating home. A marine surveyor is not qualified to do anything with a floating home in the State of Florida. Only a man with that qualification.

So I just refer to the area underneath the main floor as the bilge. We can call it the basement if you would like to call it the basement.

The bottom line is this man is qualified, and he is the only person who has appeared in this case who is qualified to comment about my floating home.

[154] MR. BIRTHISEL: It still doesn't make it relevant, Your Honor.

THE COURT: I sustain the objection.

Q. Did my floating home have a 120 amp house air conditioning unit on it?

A. It did have a household type split system air conditioning, which –

Q. You said "household type."

My question was: Was it a house air conditioning unit or was it a special marine air conditioning unit?

A. House type air conditioner.

Q. So the same kind of unit you could buy at Home Depot?

A. From an air conditioning supply, yes.

Q. Okay.

Did my floating home have a 220 watt hot water heater?

A. It did have a hot water heater. 220 watt is not the right lingo, but –

Q. Was this a hot water heater you would buy at Home Depot?

A. Yes.

Q. Do you recall your employee going with me to Home Depot to buy the hot water heater?

A. He was sent, yes.

Q. Okay.

Can you put a home hot water heater and a home air conditioner in a vessel?

[155] MR. BIRTHISEL: Objection, Your Honor.

THE COURT: Sustained.

MR. LOZMAN: I am going to try to again reintroduce this electrical circuit breaker, Your Honor.

Can I show that to the witness, please?

THE COURT: You can show it to him.

Q. Mr. Powell, isn't it true that after August, 2006, you still came to the Riviera Beach Marina to visit me on a regular basis on your way to Melbourne to see your father?

A. Yes.

Q. On how many occasions during those visits between 2006, 2007 and 2008 did I complain about the electricity at my floating home?

MR. BIRTHISEL: Objection, Your Honor. It's hearsay.

THE COURT: I will allow it for the fact that it was said, not the truth of the matter asserted.

MR. BIRTHISEL: Thank you, Your Honor.

Q. Did you forget the question?

A. No.

THE COURT: You can answer.

A. I was there repeatedly over this electrical issue. I was called by Mr. Lozman to come trying to source the problem.

Q. When you examined – in the process of examining the electrical outlets that were screwed

into a piling, was it your decision that there had to be a pedestal placed for my access [156] for my floating home?

A. That was my recommendation because the electric service there was not up to standard and it was causing overloading, overheating because of the salt air intrusion to it.

Q. After my pedestal was installed and they put a new circuit breaker in the box, did I ever show you that circuit breaker?

A. The circuit breaker –

Q. That particular circuit breaker, did I show you that when you visited me, that circuit breaker?

A. I recognize the circuit breaker.

Is that the exact one, I wouldn't know. But I do recognize that we were working on this circuit breaker, looking at it, yes.

Q. Was the condition of the circuit breakers on the dock corroded where you said the whole panel has to be replaced?

A. Yes.

Salt intrusion and damage.

Q. Wasn't there also the problem, sir, that the electric wires that came out of the box went under the dock and sometimes were covered in saltwater in high tide?

MR. BIRTHISEL: Objection, Your Honor. Relevance. He is asking this witness about the condition at Riviera Beach –

MR. LOZMAN: I am asking if he did observe –

MR. BIRTHISEL: Let me finish my objection, if I may. And he hasn't established this witness is an [157] electrical contractor, much less a marine electrical contractor that's even qualified to testify to this.

The fact the guy pops in –

THE COURT: Overruled.

Q. Did you witness – when you were there at high tide one day did you witness the electrical wiring and stuff being underwater during high tide?

A. It was submerged under water and dangerous.

MR. LOZMAN: I know you denied it before, but I will try one more time.

Over the weekend when I went to my floating home to retrieve more personal items I actually found a picture of this electrical wiring and all.

Is it possible to introduce this as an exhibit? It's not on the defense list – defendant's list?

No?

I figured I would try.

Q. During your last trip to see my floating home was it aesthetically in good shape?

A. The middle of the road.

Q. Okay.

Was the basement of my floating home during the different occasions you went in there, was it watertight?

A. It was dry. No water was coming in.

Q. Was the electrical system that you and your men put in, [158] was that in good condition?

A. Yes.

Q. Was the new roof you put in, was that in good condition?

A. It was watertight.

Q. Were the five doors and all the windows you and your men put in, were those still in good condition?

A. The – one or two of the doors had been damaged from forced entry or possibly during the tow. But other than that, they were serviceable.

Q. So based on the opinion of a building contractor, not a marine surveyor, as a building contractor was this floating home a safe residence?

MR. BIRTHISEL: Objection, Your Honor. It's not relevant.

THE COURT: Overruled.

MR. LOZMAN: It is relevant given the testimony you talked about Sparrow and saying it's a piece of junk. I think it is relevant.

THE COURT: Did you hear my ruling, Mr. Lozman?

MR. LOZMAN: No.

THE COURT: If you would confine your comments to me instead of Mr. Birthisel, you would do better because I guarantee you Mr. Birthisel is not going to agree with you in this trial. You are not going to change his mind.

I already overruled his objection.

[159] MR. LOZMAN: Okay.

A. Could you repeat the question?

MR. LOZMAN: I don't remember the exact question. Is it possible for him to read it back?

THE COURT: Ask another one then.

MR. LOZMAN: Okay.

Q. Based on your observation of your most recent visit prior to my floating home being arrested in April – okay – is it true that you visited my floating home sometime after the first of the year in 2009?

A. Yes.

Q. Okay.

During that trip after the first of the year in 2009, as a licensed building contractor that did a tremendous amount of repairs to this – as a licensed building contractor, was my floating home in a safe and livable condition?

A. Yes, it would be livable.

Q. Was it in a safe condition?

A. Yes.

It was moored properly.

Like I said earlier, there was no water intrusion.

Q. During the time you knew me in North Bay Village, was my floating home my primary residence?

A. Yes.

Q. During the three years I lived in Riviera Beach, was it my [160] primary residence?

MR. BIRTHISEL: Your Honor, I object.

How does this witness know the answer to these questions?

MR. LOZMAN: Because he used to come to see me all the time.

THE COURT: Sustained.

MR. LOZMAN: Okay.

Q. Isn't it true, Mr. Powell, that if you were to tow this floating structure in rough water, say, three to four feet waves where the waves could get above the basement area, which is a few feet above the water line, that you could have catastrophic water intrusion?

MR. BIRTHISEL: Your Honor, I object. Relevance. And this witness is not qualified to testify to that type of –

THE COURT: He towed it before.

Overruled.

Q. My question to you, sir, is that: My floating home, even though it has 30 or 40 compartments – 30 compartments you talked about, isn't it true that if you were to tow that – you were to tow that in rough waters, say three to four feet, where the waves were getting above the basement area, you know, a few feet above that basement area where they could then come in through the first floor, that that floating home would sink?

A. Yes, due to the construction of the – the light duty [161] construction of this kind of floating home.

Q. So when you towed the floating home, why did we have to wait until – okay. What was the reason we waited until March 16th and 17th and didn't tow it on March 10th?

Do you know why? Do you remember why?

A. The weather was an issue and we chose to move the floating home in calm conditions because we did not want to stress the – like I said earlier, light duty construction of this kind of floating home.

Q. Based on your intimate knowledge of my floating home that you did a huge amount of repairs and modifications to, could this be used as a means of navigation to go up and down the Intracoastal, go fishing, do stuff with?

Is this built to do that?

MR. BIRTHISEL: Relevance.

THE COURT: Sustained.

Q. Have you ever rebuilt a vessel – okay – do you own a 27-foot Magnum speedboat?

A. Yes.

Q. Now, this 27-foot Magnum, is it accurate that it was built in 1966?

A. Yes.

Q. Is it accurate that Hurricane Wilma did extensive damage to it?

A. Yes.

[162] Q. Did that extensive damage, including destroying the engines, ripping off the center console, ripping off the right part of the vessel?

A. Yes, it did.

Q. So is it safe to say that all that was left there was pretty much the hull?

A. Yes.

Q. Okay.

Now, did you not then take that hull and put all new parts and make that into a functioning vessel again?

A. Yes.

Q. Is there any way today you could take my floating home and make it into a functioning vessel?

A. No.

MR. LOZMAN: No further questions.

MR. BIRTHISEL: Your Honor, I object to – and I just couldn't get –

THE COURT: Asked and answered.

Cross examination.

CROSS EXAMINATION

BY MR. BIRTHISEL:

Q. Are you a marine surveyor?

A. No.

Q. Have you ever been a marine surveyor?

A. No.

[163] Q. Have you ever [sic] any naval architecture training?

A. No.

Q. What's your education?

A. I have high school graduation and numerous building certification classes.

Q. Okay.

Sir, do you – are you a licensed – what kind of licensed Coast Guard license do you have?

A. Years ago I had what's known as QBED (phonetic). It's like a deck hand on larger vessels.

Q. So you weren't a captain?

A. I was certified at the classes as a captain, but because of the situation, I did not go and exchange the license certificate for the captain's license because of the cost and the need to have a second captain on board whenever the large vessel that I left port with had to have two qualified people to operate it. So either way we had to have another captain on board.

Q. Thank you, sir.

Have you ever held an operator uninspected towing vessel license?

A. No, I have not.

Q. Have you ever had any towing endorsements whatsoever?

A. No, I have not.

Q. Do you know what I mean when I say "towing endorsements"?

[164] A. Like I explained, I went through all the classes. I was fully qualified to change the certificate for the licenses, but I did not consummate the license process because of the corporation needed to have other people on board if we were away from the dock more than eight hours.

Q. Understood, sir.

Two other questions.

The picture that was put in of the houseboat, which I believe was marked as Defendant's or D31 that has the sewage pipe that Mr. Lozman was referring to,

that picture was taken at – where was that picture taken?

Do you know?

A. That would be at North Bay Village at Gator Harbor (phonetic) West Marina.

Q. So that hookup to that sewage, as far as you know, was years ago?

A. Can you repeat that?

Q. That hookup to that sewage at that particular location was years ago, correct?

A. Well, it would be up to possibly Hurricane Wilma time.

Q. But you don't have any pictures or personal knowledge of whether or not it was hooked up to sewage at the City of Riviera Beach Marina, correct?

A. No.

I don't have any knowledge of that.

[165] Q. Thank you.

And one other question.

You did, in fact, tow this vessel or assist in the tow of this vessel –

A. Yes.

Q. – up the Intracoastal Waterway, correct?

A. Yes.

Q. And you are aware, are you not, that when the vessel first went to the – by the way, the tow we are talking about was the tow from North Bay Village up to the City of Riviera Beach, wasn't it?

A. The private tow that –

Q. The subject that we were talking about, the exhibits here?

A. Yes. Right.

Q. That wasn't a tow after he was in Riviera Beach, it was a tow taking it to Riviera Beach, correct?

A. Correct.

In '06.

Q. As far as you know, is it not correct that a tow took that vessel into North Bay Village to begin with? It didn't originate there, correct?

A. That's absolutely correct.

MR. BIRTHISEL: Thank you, sir. No further questions, Your Honor.

THE COURT: Redirect.

[166] REDIRECT EXAMINATION

BY MR. LOZMAN:

Q. Who was in the 30-foot Scarab that was pulling the floating home from North Bay Village to Riviera Beach?

A. Mr. Lozman.

Q. So were you – okay.

What type of boat were you in behind my floating home?

A. I was in a smaller, like a 20-foot center console that was rigged with a bridle so that I could do steerage on the rear.

Q. Isn't it true the reason you have to have another boat behind a floating home, is it because it

only draws about a foot of water, it swings around wildly and loses maneuverability?

MR. BIRTHISEL: Your Honor, I object as beyond the scope of cross.

MR. LOZMAN: No, because he has – excuse me.

THE COURT: Overruled.

Q. Isn't it true from your personal experience of having towed a floating home that it can jacknife very easily in minimal wave action and you need another boat behind it to keep it going in a straight line?

A. Yes, due to the hull, because it's not made to move like a regular boat.

Q. Did my floating home have a raked bow, a raked bow meaning angled bow?

[167] MR. BIRTHISEL: Your Honor, I object. He is taking shot number two at this witness. He already had an opportunity to ask him and he is now going beyond the scope of my cross.

MR. LOZMAN: Objection, Your Honor. He brought in the whole towing angle and he opened that door.

MR. BIRTHISEL: I didn't talk about a towing angle at all. I asked him if he had a towing license.

THE COURT: I don't think he talked about that on cross. I sustain the objection.

Q. When we were towing the floating home, isn't it true we both had radios on to talk to the bridge tenders?

A. Yes.

Q. Weren't these bridge tenders quite concerned when this floating home went through some of those bridges?

MR. BIRTHISEL: Objection, Your Honor. He is asking what the bridge tenders were thinking now.

MR. LOZMAN: No. I am asking what they stated.

THE COURT: That's hearsay.

I sustain the objection.

Q. Okay.

Did you witness a car driving – okay – near the Hillsboro Inlet on the night of March 16, did you witness some woman in a car drive into the Intracoastal?

MR. BIRTHISEL: Relevance.

THE COURT: What's the relevance of that?

[168] MR. LOZMAN: The relevance, Your Honor, is that it happened right in front of us. And when I made a sharp turn we almost crashed into another vessel.

I am asking for his recollection of that incident as far as the maneuverability of what happened that night.

THE COURT: I sustain the objection.

Q. Sir, based on your experience during that 18 hours, isn't it true that we easily could have smashed into a bridge if we didn't have the rear boat swinging us out of the way?

MR. BIRTHISEL: Objection.

THE COURT: Sustained.

MR. LOZMAN: I am sorry?

THE COURT: Sustained.

Q. Would it have been maritimely unsafe to tow that floating home with just one tow boat?

A. Yes.

MR. LOZMAN: Thank you.

THE COURT: Thank you, sir. You may step down and you are excused.

(Witness complies.)

THE COURT: Mr. Lozman, you may call your next witness.

MR. LOZMAN: I am calling Pam Ryan, sir.

MR. BIRTHISEL: Your Honor, may we take about a two-minute break just so I can use the facilities?

* * * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
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No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

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BRIEF FOR PETITIONER

Petitioner Fane Lozman respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-32a) is published at 649 F.3d 1259. The order of the United States District Court for the Southern District of Florida (Pet. App. 33a-49a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2011. Pet. App. 1a. Petitioner filed his petition for a writ of certiorari on November 17, 2011. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 3 of Title 1 of the United States Code provides in relevant part: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Section 1333 of Title 28 provides, in relevant part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction."

Section 31342 of Title 46 provides, in relevant part: "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien."

STATEMENT OF THE CASE

Structures deemed to be "vessels" are subject to the wide assortment of distinctive legal doctrines and remedies that make up admiralty law – doctrines and remedies specially adapted to the unique concerns of maritime transportation and commerce. This case presents the question whether an indefinitely moored floating structure that functions as an extension of land is a vessel, thus triggering federal maritime jurisdiction.

1. In 2002, petitioner Fane Lozman, a former United States Marine Corps officer and financial trader, purchased from a private owner what Florida law calls a "floating residential structure," Pet. App. 12a n.6, and is most commonly referred to as a "floating home."[1] Unlike craft typically called "houseboats," which sometimes have space for living and sleeping but also are used for maritime transportation, the only purpose of floating homes is to provide dwellings in which to reside. *See* Amicus Br. of Seattle Floating Homes Ass'n et al. Accordingly, floating homes are ordinarily financed with conventional mortgages, rather than the RV loans used to purchase houseboats.[2] Likewise, floating homes are subject only to an excise tax at the time of sale, whereas houseboats are subject to state

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[1] Because summary judgment was ultimately granted against petitioner, any disputed issues of fact must be resolved in this Court in his favor.

[2] *See* Polyana da Costa, How to Finance a Houseboat, http://www.bankrate.com/finance/mortgages/finance-houseboat-1.aspx (last visited May 5, 2012).

sales taxes when purchased.[3] Owners of floating homes also generally pay property taxes, just as they would for any other piece of real estate.[4]

Like other floating homes, petitioner's home bore little physical resemblance to any sort of seagoing craft. It was a rectangular structure that looked like a house on land, both in design and construction. It was made of plywood and other land-based building materials, and it was built to meet the standards of the state building code governing land-based dwellings. J.A. 38, 85.[5] Inside, the home consisted only of living quarters. It had a kitchen and dinette, a living room, three bedrooms (including one, upstairs, also used as an office), and a full bathroom. *Id.* at 39. The home also had French doors on three of its four sides, only a few feet above the water line. *Id.* at 12, 44. In addition, the home had internal plumbing for purposes of serving the dishwasher, shower, sink, and other devices. The home was fitted

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[3] *See* Special Agents Realty, http://www.specialagentsrealty.com/news-real-estate-investing-finance/houseboat-floating-home/ (Jan. 23, 2011).

[4] *See* Cari Gennarelli, Floating Home Property Taxes Explained, http://www.marinmodern.com/blog/floating-home-property-taxes-explained.html (Sept. 11, 2011).

[5] These facts and various others are documented in a "surveyor's report" that the City commissioned after bringing this lawsuit. The report refers to petitioner's home as a "houseboat" and uses other marine terminology. These characterizations, of course, are no more relevant to the question presented here than the City's assertion in the caption of its complaint that petitioner's home is a "vessel." The question of vessel status is one of actuality, not labeling during litigation.

for a land-based sewer line, just as a land-based home with these devices would have been. *Id.* at 41.

Also like other floating homes, petitioner's home was not designed for use in maritime transportation. It lacked any means of propulsion or steering; it did not have a raked (that is, angled) bow to break and absorb wave action; and it lacked lifeboats and other safety equipment. Pet. App. 18a-19a; J.A. 12. It rested only ten inches underwater. J.A. 37. It had no Hull Identification Number, could not get a vessel registration from the State, and was not eligible for vessel certification by the Coast Guard. Pet. App. 20a, 42a; J.A. 37.

When petitioner purchased the floating home, it apparently had never moved. It had been built by the previous owner and was affixed to that owner's seawall on a canal in the Ft. Myers area. It had no cleats or other devices to enable towing. Petitioner thus installed temporary cleats (mounted on blocks of wood screwed into the home siding) in order to have the home relocated to a floating home community in North Bay Village, Florida. Despite the installation of the cleats, the trip over the Okeechobee Waterway was a difficult one. Waves only three to four feet high could have entered the home through the unsealed French doors and siding and caused it to sink. J.A. 98; *see also* Pet. App. 42a (noting that "moving [the structure] may easily damage it"). The home survived the trip, but according to petitioner, it sustained serious damage as it was pulled along and

required emergency repairs to keep it afloat. Pet. App. 18a.[6]

Petitioner lived in North Bay Village for three years. J.A. 72. He was required to have the home moved twice to neighboring mooring sites within the Village, Pet. App. 3a n.2, but the home otherwise remained fixed in place, and petitioner treated the Village as his indefinite residence.

In 2005, however, Hurricane Wilma struck North Bay Village and destroyed nearly all of the city's floating homes. Although the storm spared petitioner's home, he needed to find a new place to live.

After making arrangements with respondent City of Riviera Beach, petitioner had the structure moved to a slip at the City's municipal marina. J.A. 74-75. This time, the home was towed by means of cleats that a contractor had installed while the home

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[6] Petitioner told the district court in one of his *pro se* legal filings that the home "almost sunk" while being pulled across Lake Okeechobee and that a high-volume pump had to be rushed to the site to pump out water that had entered the home. He also said that the home required "a number of underwater patches" as a result of the tow. He suggested that "[i]f needed, Lozman or someone appointed by the Court could take photographic evidence [of these events and repairs] and provide it to the Court." Claimant's Surreply to Pl.'s Mot. for Part. Sum. J. at 5-6 (Dkt. 127). The district court did not follow up on this suggestion, presumably because – as is elaborated *infra*, at 10-11 – Eleventh Circuit law at the time of the summary judgment proceedings here provided that a floating structure is a vessel even if it can be towed only "to [its] detriment." Pet. App. 42a (quoting *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)).

was in North Bay Village. *Id.* at 86-87. Relocating the home required two boats – one at the front and one in the back – in order to control the home's potentially erratic movement and to prevent it from jackknifing. *Id.* at 103-04. The voyage took about eighteen hours, traveling a few miles per hour – the speed at which an average person walks. *Id.* at 75 (noting time); Pet. App. 19a (noting distance traveled).

Upon arriving at Riviera Beach, petitioner moored the home at the City's marina and – as he had done in North Bay Village – connected it to the municipal water system and several shore-based utilities, including electric power, cable television, and the Internet. J.A. 33; Pet. App. 41a-42a. While petitioner had also connected his home to the land-based sewer system in North Bay Village, Tr. Ex. D31, he was unable to do so in Riviera Beach because the marina's infrastructure was degraded and had not yet been rebuilt.

As in North Bay Village, petitioner planned to live in Riviera Beach indefinitely. He listed the marina as the residence on his driver's license and for voting registration, and received mail there. Lozman Dep. 20-24, 38 (Dkt. 98). Petitioner also filed a designation and declaration of homestead under Florida law, which the state has made available to floating homes because they are "designed for use as residences." *Miami Country Day Sch. v. Bakst*, 641 So. 2d 467, 469 (Fla. App. 1994); *see also* Lozman Aff. ¶ 1 (Dkt. 110 Ex. 5).

The relationship between petitioner and the City soon soured. Upon learning that the City planned to undertake a multi-billion dollar redevelopment plan

that would transform the marina into dockage for large yachts, petitioner sued the City in state court. He alleged that the city council meeting that finalized the deal between the City and the developer violated Florida's Sunshine Law because it failed to give proper advance notice to the public. Pet. App. 4a. "While it is not clear from the record how that lawsuit was resolved, the redevelopment plan was ultimately postponed or abandoned, a result for which Lozman takes credit." *Id.*

Shortly thereafter, the City set out to exact revenge. The City filed suit against petitioner in state court seeking to evict petitioner under Florida landlord-tenant law. The City alleged that petitioner had failed to muzzle his ten-pound dachshund and had hired unlicensed repair persons to work on his floating home. Pet. App. 4a. Petitioner represented himself and took the case to trial, maintaining that the City's actions constituted impermissible retaliation for his protected advocacy concerning the redevelopment dispute. *Id.* at 5a. The jury returned a verdict for petitioner. *Id.*

A few months later, the Riviera Beach City Council revised the Marina Rules and Regulations to require all structures moored there to be registered as vessels; to be "operational and capable of vacating the marina in the case of an emergency"; and to satisfy other rules. Pet. App. 5a-6a. The City then asked all of the marina's residents to sign new dockage agreements reflecting the changes. *Id.* at 6a. The City notified petitioner that it would revoke his permission to remain in the marina unless he complied with the new requirements (something that was impossible in light of the nature of his floating

home), executed the new agreement, and paid allegedly outstanding dockage fees. *Id.* at 6a-7a. Petitioner did not execute the agreement, and his floating home remained at the marina. *Id.*

2. Having failed in its efforts to obtain state-law relief against petitioner, the City turned to federal law. It filed an *in rem* suit in the United States District Court for the Southern District of Florida, alleging trespass and seeking to execute a maritime lien on petitioner's floating home for a purported debt of about $3,000. Pet. App. 2a; J.A. 8-10. The City named petitioner's home as the defendant, *see, e.g.*, *Madruga v. Superior Court*, 346 U.S. 556, 560 (1954), leaving petitioner as the "claimant." As its basis for federal jurisdiction, the City invoked 28 U.S.C. § 1333, which vests original subject matter jurisdiction over admiralty and maritime actions in federal district courts, and the Federal Maritime Lien Act, 46 U.S.C. § 31342, which allows a person who "provid[es] necessaries to a vessel" to collect on that debt through a lien. J.A. 5.

A maritime lien is an "extraordinary remedy" specially tailored to federal maritime law. *Usher v. M/V Ocean Wave*, 27 F.3d 370, 373 (9th Cir. 1994). It attaches to a vessel "without notice" to the owner and allows an automatic seizure of the vessel without providing an opportunity to be heard. *Id.* at 374. In particular, a maritime lien makes the vessel, rather than its owner, the obligor, permitting the creditor to recover directly against the vessel (the *res*). This highly unusual scheme is necessary to "keep ships moving in commerce while preventing them from escaping their debts by sailing away." Thomas J. Schoenbaum, Admiralty and Maritime Law § 7-1, at

443 (4th ed. 2004). Accordingly, "both the lien and the district court's jurisdiction depend on a ship's status as a 'vessel.'" *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010).

Immediately upon the filing of the City's complaint, the district court issued a warrant for the arrest of petitioner's home. Pet. App. 7a-8a. The U.S. Marshals Service executed the warrant and had the floating home towed to Miami. *Id.* at 8a.

The following day, petitioner filed a *pro se* emergency motion to dismiss the complaint and to have the City return his home to the marina. In his motion, petitioner argued that his home was not a "vessel," which 1 U.S.C. § 3 defines for purposes of the Maritime Lien Act and innumerable other statutes as "includ[ing] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Petitioner maintained that his home did not satisfy this definition because its purpose was not maritime transportation, but rather to serve as a stationary residence. The district court denied petitioner's motion and allowed discovery to proceed. J.A. 67-68.

Following discovery, petitioner – who continued to proceed *pro se* throughout the district court proceedings – moved to dismiss the case for lack of subject matter jurisdiction, again arguing that his floating home was not a "vessel." The City responded that, under Section 3, anything that is "capable of being towed" is a vessel, and that petitioner's home had indeed been towed. Resp. to Mot. to Dismiss 6 (Dkt. 68). The City thus not only opposed petitioner's

motion to dismiss but also moved on its own for partial summary judgment on the issue.

The district court granted the City's motion. Pet. App. 48a. The court accepted that petitioner's floating home was indefinitely moored and did not dispute that it lacked any transportation purpose. *Id.* at 40a-42a. But the court deemed the purpose of the home irrelevant in light of the Eleventh Circuit's decision in *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). In that case, the Eleventh Circuit held that a floating casino was a vessel, reasoning that anything that can be towed over water, even "to [its] detriment," is a vessel. Pet. App. 40a-42a (quoting *Belle of Orleans*, 535 F.3d at 1312). Petitioner's home satisfied that test.

Following a bench trial, the district court found that petitioner was delinquent in his payments to the City in the amount of $3,039.88. The district court also awarded the City $1 for the trespass claim. To satisfy the judgment, the court ordered that petitioner's floating home be sold at auction by the U.S. Marshals Service. Pet. App. 9a-10a.

Petitioner asked the district court, in an emergency motion, to stay the sale and the court's order and judgment. But the district court denied that motion. Petitioner then sought the same temporary relief in the Eleventh Circuit pending his appeal, but the Eleventh Circuit denied that request as well.

The City itself attended the auction and purchased the floating home as the highest bidder. Pet. App. 9a-10a. The City subsequently destroyed it.

3. The Eleventh Circuit affirmed the district court's vessel determination and overall judgment. Like the district court, the Eleventh Circuit did not dispute that petitioner's floating home was an indefinitely moored floating structure that "was designed as a residence that just happened to float." Pet. App. 18a-19a (quoting petitioner's brief). But also like the district court, the court of appeals deemed that reality irrelevant. The Eleventh Circuit emphasized that its decision in *Belle of Orleans* had held that "the status of 'vessel' does not depend in any way on either the purpose for which the craft was constructed or its intended use." *Id.* at 19a. According to the Eleventh Circuit, so long as a structure is "capable of moving [by tow] over water," even to its "detriment," it is a vessel. *Id.* at 18a-19a (quoting and citing *Belle of Orleans*, 535 F.3d at 1312).

The Eleventh Circuit acknowledged that its holdings here and in *Belle of Orleans* conflicted with the Fifth Circuit's holding in *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995). Pet. App. 15a-16a. In *Pavone*, the Fifth Circuit drew on a long line of circuit precedent – based, in turn, on prior decisions from this Court – to hold that a floating casino was not a vessel, even though it had been towed several times over considerable distances (and even had a contract contemplating potential future tows if necessary). 52 F.3d at 563-64, 568-70; *see also Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627-30 (1887) (floating dry-dock not a vessel); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (indefinitely moored wharfboat used as a business office and warehouse not a vessel, even

though previously towed); *Roper v. United States*, 368 U.S. 20, 23-24 (1961) (deactivated military ship used as "mobile warehouse" for grain storage not a vessel, even though previously towed). The Eleventh Circuit, however, refused to follow *Pavone*, reasoning that this Court's subsequent decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), which cited *Pavone* with approval in the course of holding that a harbor dredge was a vessel, "clearly rejected any definition of 'vessel' that relies on [a structure's] purpose." Pet. App. 16a.

4. This Court granted certiorari. 132 S. Ct. 1543 (2012).

SUMMARY OF ARGUMENT

Indefinitely moored floating structures that function as extensions of land, such as petitioner's floating home, do not constitute "vessels" under 1 U.S.C. § 3. Contrary to the Eleventh Circuit's view, it is immaterial whether such structures may be towed over water without sinking. In order to be a vessel, a structure's purpose must be to carry people or things over water, and indefinitely moored structures that function as extensions of land lack any such purpose.

I. Section 3 provides that the term "vessel" "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of *transportation* on water" (emphasis added). The ordinary meaning of "transportation" – as well as the meaning found in legal dictionaries and reflected throughout the U.S. Code – is the movement of people or things from one place to another. This notion of conveyance is distinct from merely being moved by something else. And the

latter is the most that ever happens to indefinitely moored floating structures.

That a structure need only be "capable" of serving as a means of maritime transportation does not alter this conclusion. On the contrary, general maritime law – which Section 3 codified and is intended to track – has always looked to a structure's *purpose*, as evidenced by its design and function, to determine whether it is "capable" of moving people or things over water. Indefinitely moored floating homes and businesses lack any transportation purpose.

This Court's precedent is in accord. In a series of cases dating back to the nineteenth century, this Court has confirmed that a structure's purpose determines whether it is capable of serving as a means of maritime transport. And applying that purposive test, this Court has repeatedly held that indefinitely moored structures functioning as extensions of land are not vessels. *See Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887) (floating dry-dock permanently moored by means of large chains); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926) (floating wharfboat that functioned as a business office and warehouse); *Roper v. United States*, 368 U.S. 20 (1961) (deactivated military ship being used as a grain warehouse). In two of those cases, the structures at issue had been towed multiple times over considerable distances. But this Court deemed that fact inconsequential because they were "not moved in order to transport commodities from one location to another." *Roper*, 368 U.S. at 23; *see also Evansville*, 271 U.S. at 22 (structure "was not used to carry freight from one place to another").

Contrary to the Eleventh Circuit's view, this Court's recent decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), did not abrogate the purposive approach to determining vessel status. To the contrary, *Stewart* reaffirmed that, in order to be a vessel, a floating structure's purposes must include moving people or things over water. Transportation was not the *primary* purpose of the type of structure involved in *Stewart*, a harbor dredge. But this Court stressed, consistent with prior cases, that transportation must be *one* of the purposes of a structure for it to qualify as a vessel. That is why this Court was careful to note that "in performing their work [dredges] carr[y] machinery, equipment, and crew over water." *Id.* at 492. And that purpose, this Court explained, differentiated dredges from the structures in *Cope*, *Evansville*, and *Roper*, which performed their functions by sitting still. Accordingly, after *Stewart* as before, indefinitely moored structures that function as extensions of land fall outside of the scope of Section 3.

II. Abandoning the longstanding rule that indefinitely moored floating structures that function as extensions of land are not vessels would create significant problems.

If Section 3 encompassed indefinitely moored floating structures, such structures would become subject to a host of substantive maritime laws – laws specially designed to accommodate the perils of the sea – that Congress cannot possibly have intended to apply to them. For example, the Federal Maritime Lien Act gives putative creditors the extraordinary ability to attach liens without notice and to have "vessels" seized without providing the owner an

opportunity to be heard. The objectives of that Act are to allow ships engaged in operations far from home to obtain necessary goods and services, and to prevent ships from sailing away to escape their debts. But those objectives do not apply to indefinitely moored floating homes or businesses. Similarly, indefinitely moored structures should not be covered by the Limitation of Liability Act, which restricts damages available to tort plaintiffs to the value of a "vessel" and its cargo; by the Jones Act and other uniquely generous protections afforded to certain employees aboard "vessels"; or by federal maritime safety laws intended to protect "vessels" and their occupants when engaged in maritime transportation.

Treating indefinitely moored floating structures that function as extensions of land as vessels would also undermine principles of federalism. Admiralty jurisdiction seeks to promote commerce by providing a uniform system of federal regulation for maritime activity. There is no federal commercial interest, however, in regulating floating homes and businesses that function as extensions of land. Therefore, expanding the reach of Section 3 to include such structures would unnecessarily burden federal courts and agencies with resolving parochial issues such as the landlord-tenant dispute at issue here. Our federal system has more appropriately entrusted the regulation of such matters to the states, and the states have long been performing that task perfectly well.

ARGUMENT

Petitioner's home was not designed or used to move people or goods over water. It had no raked bow, no means of self-propulsion or steering, and did

not perform any function that a shore-based structure would not have performed just as well. It was a fixed residence that was connected to land-based utilities. Indeed, at the time it was seized, it had not been moved in more than three years. In short, petitioner's floating home was an indefinitely moored structure that functioned as an extension of land.

It has long been the rule that such structures are not "vessels." And the configuration and animating purposes of maritime law confirm that the regulation of such structures is better left to land-based law.

I. An Indefinitely Moored Floating Structure That Is Functionally An Extension Of Land Is Not A Vessel.

The text of 1 U.S.C. § 3, buttressed by historical maritime law and this Court's precedent, makes plain that indefinitely moored floating structures that are functionally extensions of land are not "vessels" for purposes of federal maritime jurisdiction. Contrary to the Eleventh Circuit's view, it makes no difference whether such structures can be towed across water without sinking. Being pulled across the water is not the same as serving as a means of maritime transportation; only structures whose purpose is transportation fall within the ambit of Section 3.

A. The Text Of 1 U.S.C. § 3, Understood In Light Of The General Maritime Law It Codified, Does Not Encompass Indefinitely Moored Structures That Function As Extensions Of Land.

Section 3 provides the default definition of "vessel" for use throughout the U.S. Code: the term

"includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Indefinitely moored floating structures that are functionally extensions of land fall outside of this definition because such structures are neither used for "transportation" nor "capable" of being so used.

1. The process of statutory construction always "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). In 1873, when Congress enacted Section 3, the ordinary meaning of the word "transportation" contemplated the notion of moving people or goods. A leading dictionary of the period defined "transportation" as "[t]he act of transporting, carrying, or conveying from one place to another." Noah Webster, An American Dictionary of the English Language 1406 (Chauncey A. Goodrich & Noah Porter eds., 1873). The intervening 140 years have not altered this meaning: "transportation" is currently defined as connoting the "conveyance of passengers, goods, or materials esp. as a commercial enterprise," Webster's Third New International Dictionary 2430 (3d ed. 1993), or the "conveyance (of things or persons) from one place to another." 18 Oxford English Dictionary 424 (2d ed. 1989).

The same meaning, grounded in the concept of carriage, has long pertained in American legal parlance. The first edition of Black's Law Dictionary defined "transportation" as "[t]he removal of goods or persons from one place to another, by a carrier." Henry Campbell Black, A Dictionary of Law Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and

Modern 1184 (1st ed. 1891). That definition has barely changed with the publication of eight successive editions; the ninth edition's definition – "[t]he movement of goods or persons from one place to another by a carrier" – is virtually identical to the first's. Black's Law Dictionary 1638 (9th ed. 2009).

Other provisions of the U.S. Code demonstrate that Congress subscribes to this ordinary meaning of "transportation." *Cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (examining usage of statutory term throughout the Code to confirm its meaning in particular provision). The Code does not expressly define "transportation." But it repeatedly employs the term to signify the same thing it does in normal usage – carrying people or goods. *See, e.g.*, 8 U.S.C. § 1324 ("means of transportation" used to move illegal aliens within the United States); 18 U.S.C. § 2421 ("transportation" of individuals across state lines for sexual activity); 39 U.S.C. § 3208 (shipments of official matter to be made by most economical "means of transportation").

The Eleventh Circuit's focus on whether a structure is merely capable of "*moving* over water," Pet. App. 18a (quoting *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)) (emphasis added), contradicts this ordinary meaning and pattern of usage. Objects that are merely "moved" (or even "transported under tow," *Belle of Orleans*, 535 F.3d at 1312), do not necessarily serve as a "means of transportation." Only structures used to convey people or goods from one place to another fit this description – a requirement that excludes from vessel status indefinitely moored floating structures functioning as

extensions of land. Such structures, at most, are merely themselves occasionally moved from place to place. But sporadic movement does not, without more, alter the character of, say, a floating home as a stationary residence, a floating business office as a meeting place, or a floating casino as an entertainment venue.

Lest there be any doubt that Section 3 uses "transportation" to refer to more than the bare concept of movement, another provision of the U.S. Code, 18 U.S.C. § 1081, demonstrates that if Congress had meant to encompass anything that floated and thus could be towed within Section 3's definition of "vessel," it would have used different language to reach that result. *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). Section 1081 defines the term "vessel" for purposes of certain criminal gambling laws as including "every kind of water and air craft or other contrivance used or capable of being used as a means of transportation on water, or on water and in the air, *as well as any ship, boat, barge, or other water craft or any structure capable of floating on the water.*" 18 U.S.C. § 1081 (emphasis added).

It is scarcely conceivable that the 81st Congress, which drafted Section 1081, thought that the description of "means of transportation" in the first half of that statute, which incorporates the definition of vessel in Section 3, encompassed the very structures described in the second half – those that float upon water and are capable of being towed, but are *not* used to move goods or people. Such an

assumption would trample "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). The only logical conclusion one may draw from Section 1081 is that Congress thought it necessary to include the additional language regarding floating structures because merely floating (and thus being capable of tow) does not render something a "means of transportation."

2. Instead of focusing on the word "transportation," the Eleventh Circuit fixated on a different word in Section 3 – "capable." In the Eleventh Circuit's view, that word expands the statute to cover not merely structures designed and used for transportation, but also anything that is conceivably susceptible to being used to that end. Pet. App. 13a. This view, however, rests on an overly expansive interpretation of the word "capable" – one that is inconsistent with the statutory context in which it appears, as well as with the general maritime law that informs the meaning of Section 3.

The word "capable" can be understood in two alternate ways: one that refers to an object's performance of some function as within the realm of conceivability, and another that refers more narrowly to the object's purpose or suitability for performing some function.[7] The Eleventh Circuit settled without

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[7] At the time of Section 3's enactment, "capable" was defined as "[p]ossessing ability, qualification, or *susceptibility*; having capacity; adapted; *suited*." Webster's (1873) at 193 (emphases added). Today, "capable" has similarly been defined as either "of a nature, or in a condition, to allow or admit of;

serious analysis on the first of these connotations. But in construing statutory terms, a court should consider not "only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quotation marks and citation omitted). The context in which Section 3 appears makes plain that the provision uses the word "capable" in its narrower sense, the one relating to purpose.

Section 3 sets forth a default definition of "vessel," a term that triggers a vast array of substantive maritime statutes. Accordingly, this Court has instructed that Section 3 cannot "sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 494 (2005). Yet if the Eleventh Circuit were correct that the word "capable" confers vessel status upon anything that can be towed without sinking, Pet. App. 21a, then maritime law would come to govern a multitude of floating structures that have no maritime transportation function whatsoever. Driftwood, for example, is capable of being pulled over water without sinking, as are floating bridges, swimming platforms, doors removed from their hinges, and innumerable other objects made of wood or plastic. Such items do not have the slightest relevance to a system of regulating maritime

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admitting; *susceptible*" or "[h]aving the needful capacity, power, or *fitness* for (some specified purpose or activity)." 2 Oxford English Dictionary 856 (2d ed. 1989) (emphases added).

commerce. It is implausible to think that Congress intended the numerous statutory regimes governing vessels to regulate them.

The general maritime law that Section 3 incorporates confirms this analysis. Because "Section 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law," this Court has emphasized that the statute should be construed "in light of the term's established meaning in general maritime law." *Stewart*, 543 U.S. at 490, 492; *see also id.* at 490-92 (referencing treatises and surveying lower court decisions around the time of Section 3's enactment to discern the statute's meaning). The leading admiralty treatise at the time of Section 3's enactment, Benedict's on Admiralty, explained that "[i]t is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes [vessel status], but the *purpose and business of the craft*, as an instrument of naval transportation." Erastus Cornelius Benedict, The American Admiralty, its Jurisdiction and Practice § 218 (2d ed. 1870) (emphasis added).[8]

As contemporary decisions made clear, this purposive approach to assessing "capability" for maritime transport excluded from vessel status

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[8] This concept of purpose was an objective one, focusing on the uses for which a structure was designed and in which it was employed. A purposive test that disregards an actor's *subjective* intent is, of course, a familiar notion in this Court's jurisprudence. *See, e.g.*, *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011) (determining "primary purpose" of a police interrogation by "objectively evaluat[ing] the circumstances" and actions of parties involved).

indefinitely moored structures that functioned as extensions of land. In 1869, for instance, the Southern District of New York held that a steamboat hulk that had been decommissioned, towed, and turned into a dockside hotel was not a vessel. *The Hendrick Hudson*, 3 Ben. 419 (S.D.N.Y. 1869). The court explained that the test for vessel status looked to "the actual status of the structure, as being fairly engaged in commerce or navigation." *Id.* at 421. This test, the court elaborated, left "[a] floating house of religious worship, or a floating swimming bath, or *a floating residence*" beyond the reach of admiralty jurisdiction. *Id.* at 420 (emphasis added). The same was true of the hulk. Even though all of these structures "could be towed, and, in such a sense, navigated," they "would not be engaged in navigation" in the sense necessary to constitute a vessel. *Id.*

Other lower court decisions applied the purposive approach to reach similar results. One case involved a floating scow, upon which rested "a floor and a house nearly the size of the float." *Woodruff v. One Covered Scow*, 30 F. 269, 269 (E.D.N.Y. 1887). Just like petitioner's home in this case, the structure had "for a long period been moored alongside [a] wharf, in one of the slips of [a] harbor, being attached to the wharf by lines, and there safely rising and falling with the tide." *Id.* The court held that the structure was not a vessel because it was "stationary, and never employed in the transportation of freight or passengers from place to place upon the water." *Id.* at 270. In another case, a court held that a floating scow platform was not a vessel even though it was "capable of being towed from one wharf to another." *Ruddiman v. A Scow Platform*, 38 F. 158, 158

(S.D.N.Y. 1889). The platform, the court emphasized, "was not designed or used for the purpose of navigation, nor engaged in the uses of commerce, nor in the transportation of persons or cargo." *Id.* at 158.

Years later, still another court summed up the law this way: "The word 'capable' in [Section 3's] definition is to be read 'practically capable,'" because "any contrivance that will float on water is *capable* of being used as a means of transportation (of things or persons) on water." *Petition of Kansas City Bridge Co.*, 19 F. Supp. 419, 419 (W.D. Mo. 1937) (citation omitted); *see also* George Rutherglen, *Dead Ships*, 30 J. of Mar. L. & Com. 677, 682 (1999) ("Anything can be towed, provided that it can float. The fact that it is sufficiently seaworthy to be towed does not make it into a vessel."). By looking to a structure's "practical capability," in short, general maritime courts treated as vessels only craft whose *purpose*, evinced by their design and function, was to move people or things over water.[9] Indefinitely moored floating structures were not vessels under this test.

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[9] The Third Circuit, for example, held that a dredge was a vessel as defined by Section 3 because "it was intended and adapted for navigation and transportation by water of its crew, supplies and machinery, from point to point." *The International*, 89 F. 484, 485 (3d Cir. 1898). Other lower court decisions applied the purposive test to find other structures vessels for the same reason. *See The Hezekiah Baldwin*, 8 Ben. 556, 557 (E.D.N.Y. 1876); *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886); *Mosser v. The City of Pittsburgh*, 45 F. 699, 702-03 (W.D. Pa. 1891); *Charles Barnes Co. v. One Dredge Boat*, 169 F. 895, 901 (E.D. Ky. 1909).

B. This Court's Precedent Makes Clear That Indefinitely Moored Floating Structures Are Not Vessels, Regardless Of Whether They Can Be Towed.

This Court has repeatedly confirmed that indefinitely moored structures that function as extensions of land are not vessels. Contrary to the Eleventh Circuit's view, this Court's recent decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), did not abandon that precedent. To the contrary, *Stewart* reaffirmed the exclusion of indefinitely moored structures, such as floating homes, from vessel status.

1. Indefinitely moored floating structures that function as extensions of land fall into two general categories: (a) craft that were never intended for use as transportation over water; and (b) "dead ships" – that is, structures that were once vessels but are removed from navigation and thus no longer have the purpose of transporting people or things. Prior to *Stewart*, this Court consistently held, in accordance with general maritime law, that both kinds of structures do not constitute vessels.

a. This Court explained more than a century ago, echoing Benedict's treatise, that the question of vessel status "regards only the purpose for which the craft was constructed, and the business in which it is engaged." *Perry v. Haines (The Robert W. Parsons)*, 191 U.S. 17, 30 (1903). That test remains the law. *See* 1 Benedict on Admiralty § 164 (2012) (vessel status depends on "the purpose and business of the craft as an instrument of maritime transportation"); Thomas J. Schoenbaum, Admiralty and Maritime

Law § 1-6, at 37 (4th ed. 2004) ("The most basic criterion used to decide whether a structure is a vessel is the *purpose* for which it is constructed and the business in which it is engaged.") (emphasis in original). And applying that general test, this Court has twice held that indefinitely moored structures never intended for moving people or things across water are not vessels.

The first such case was *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887). *Cope* involved a floating dry-dock, which, like a floating home, was "a large oblong box, with a flat bottom and perpen-dicular sides." *Id.* at 627. This Court characterized the dry-dock – again, in terms reminiscent of petitioner's floating home – as a "fixed structure," "permanently moored by means of large chains." *Id.*; *compare* Pet. App. 17a-18a. Referring to the concept of "purpose" ten times in five pages, this Court held that the dry-dock was not a vessel because it was "not used for the purpose of navigation or for "the purpose of locomotion from one place to another." *Id.* at 626-27.

In reaching its conclusion, the Court contrasted a dry-dock and a number of other indefinitely moored structures with the hopper-barge involved in a contemporaneous English case, *The Mac*, [1882] 7 P. 126 (Eng.). The hopper barge, this Court observed, was a vessel because its purpose was "carrying men and mud." 119 U.S. at 629-30. But this Court explained that *The Mac* went "as far as any case has gone in extending the meaning of the terms 'ship' or 'vessel.'" *Id.* at 630. "[N]o case can be found which would construe the terms [ship or vessel] to include a dry-dock, a floating-bridge, or meeting-house, permanently moored or attached to a wharf." *Id.*; *see*

also Perry, 191 U.S. at 30, 34 (noting that *Cope*'s purpose requirement "rule[s] out the floating dry dock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors' Bethel moored to a wharf, . . . and a gas float moored as a beacon") (citations omitted). Just because a structure "floats on the water," this Court stressed, "does not make it a ship or vessel." *Cope*, 119 U.S. at 627.

This Court returned to the question of vessel status in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926). *Evansville* involved a wharfboat – a floating structure used as a business office and a platform "to transfer freight between steamboats and land and from one steamboat to another." *Id.* at 21. Like petitioner's floating home, the wharfboat was rectangular and built mostly of wood. "It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters." *Id.* The wharfboat was also "secured to the shore by four or five cables," and – like petitioner's home – had "connections with the water, electric light and telephone systems of the city." *Id.* at 21-22.[10]

Relying on *Cope* and *Perry*, this Court held that the wharfboat was not a vessel. This Court reasoned that the wharfboat "was not practically capable of being used as a means of transportation" because it

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[10] A photograph of a turn-of-the-century wharfboat is available at http://www.flickr.com/photos/ohiocountypublic library/6123544619/. The physical design of the structure bears a striking resemblance to petitioner's floating home.

"was not used to carry freight from one place to another." *Evansville*, 271 U.S. at 22. Rather, the wharfboat's purpose was to function as a stationary "office, warehouse and wharf." *Id.* "It performed no function that might not have been performed as well by an appropriate structure on the land." *Id.*

Evansville also clarified that the mere fact that a structure has been towed does not render it a vessel. After years of service on the Mississippi River, the *Evansville* wharfboat was towed hundreds of miles from Arkansas to Madison, Indiana, "where it was overhauled, and then to Louisville, Kentucky, where it was used." *Id.* at 20. It then was towed back to Madison, and then more than one hundred and fifty miles to Evansville, Indiana, where the events at issue took place. *Id.* While in service in Evansville, it also was towed yearly to a local harbor to "protect it from ice." *Id.* at 20-21. Notwithstanding all of these tows, this Court described the wharfboat at the time of the events at issue as having a "permanent location" and declined to treat it as a vessel. *Id.* at 22.[11]

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[11] The distinction between structures used to move people or things and those used for stationary purposes resonates in another area of this Court's jurisprudence: the Fourth Amendment's "automobile exception." Under that exception, police need not obtain a warrant before searching a vehicle "because [a] vehicle can be *quickly moved* out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153 (1925) (emphasis added). In *California v. Carney*, this Court held that a motor home fell within the automobile exception because it was "readily mobile" and "being used not as a residence, but as a vehicle." 471 U.S. 386, 393 (1985). By contrast, this Court reserved the question

b. This Court has also determined that even a floating structure that was once a vessel loses its vessel status (and becomes what is sometimes called a "dead ship") when it is removed from navigation. This is true whenever the vessel "is taken out of service indefinitely; it need not be removed from service forever." Rutherglen, 30 J. Mar. L. & Com. at 679.

Thus, in *Roper v. United States*, this Court agreed with a trial court's determination that a deactivated military ship converted into a floating grain warehouse was not a "vessel in navigation." 368 U.S. 20, 23-24 (1961).[12] The deactivated ship had

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whether the exception would apply to a more fixed structure "objectively . . . being used as a residence." *Id.* at 394 n.3. Consistent with its earlier observation of a "long-recognized distinction between stationary structures and vehicles," *id.* at 390, this Court instructed that evidence that a potentially movable home was "elevated on blocks," "connected to utilities," and not licensed to travel may be relevant in determining whether the automobile exception applies, *id.* at 394 n.3. Applying this guidance, lower courts have concluded that trailer homes do not fall within the automobile exception. *See, e.g.*, *United States v. Green*, 2005 WL 3088351, at *5 (E.D. Tenn. Nov. 17, 2005); *United States v. Levesque*, 625 F. Supp. 428, 450-51 (D.N.H. 1985). Others have found the difference between motor homes and trailer homes so intuitive that they have treated the latter as subject to the ordinary rules governing immobile residences without analysis. *See, e.g.*, *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006); *United States v. Pelayo-Landero*, 285 F.3d 491, 495-98 (6th Cir. 2002). The objective determination that a floating home – as opposed to a houseboat – is not "readily mobile" and has a residential purpose is no more difficult to make.

[12] Although *Roper* used the phrase "vessel in navigation," 368 U.S. at 23-24, this Court clarified in *Stewart* that "vessel in

been towed twice over a two and one-half year span – the second time while carrying "a licensed riding master and six linemen stationed aboard." *Id.* at 22. Yet this Court emphasized that the structure "was not moved in order to transport commodities from one location to another." *Id.* at 23. Instead, it merely "served as a mobile warehouse which was filled *and then moved* . . . to perform its function of storing grain until needed, at which time it was returned and unloaded." *Id.* (emphasis added); *see also West v. United States*, 361 U.S. 118, 122 (1959) (deactivated military ship that had been towed was nevertheless "not in maritime service"). This movement, in the absence of a transportation purpose, was not enough to make the structure a vessel.

Under *Roper*, in short, even if an indefinitely moored structure could previously have been characterized as a vessel, it is not a vessel once it no longer has any transportation purpose. And if the "mobile warehouse" in *Roper* had ceased having any such purpose, then surely a floating home or business lacks any such purpose, too.

2. The Eleventh Circuit did not consider or even cite *Cope*, *Evansville*, or *Roper* in the decision below. Instead, the Eleventh Circuit believed that this Court's more recent decision in *Stewart* "clearly rejected any definition of 'vessel' that relies on . . . 'purpose,'" in favor of one that looks merely to susceptibility to being towed across water. Pet. App.

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navigation" and "vessel" are identical in meaning. 543 U.S. at 496. A vessel not in navigation, in other words, is not a "vessel" under Section 3 at all.

16a (quoting *Belle of Orleans*, 535 F.3d at 1311). The court of appeals thus concluded that indefinitely moored floating structures, such as floating homes and casinos, are vessels because they are "capable of being transported under tow" without sinking, even if "to [their] detriment." *Id.* at 18a.

The Eleventh Circuit erred. *Stewart* is perfectly consistent with the longstanding purposive approach to determining vessel status and reinforces the proposition that indefinitely moored floating structures that are secured to land are not vessels.

a. *Stewart*'s unanimous holding – that a harbor dredge is a vessel – made no material change in prior law. This Court had already stated a century earlier that dredges and similar craft were vessels. *Ellis v. United States*, 206 U.S. 246, 259 (1907); *see also Norton v. Warner Co.*, 321 U.S. 565, 571 (1944) (holding that barge was a vessel and citing lower court cases holding that dredges were vessels). And the reasoning that *Stewart* gave for reaffirming that conclusion – namely, that dredges "serve[] a waterborne *transportation function*, since in performing their work they *carr[y] machinery, equipment, and crew over water*," 543 U.S. at 492 (emphasis added) – is not in any way novel. It relies upon the traditional purposive test for vessel status.

Stewart also clarified that a structure is a vessel if it is "practically capable of maritime transportation, *regardless of its primary purpose*." 543 U.S. at 497 (emphasis added). But contrary to the Eleventh Circuit's view, *Stewart*'s rejection of a "primary purpose" test did not discard the purposive test altogether. Rather, *Stewart* explained that even if a structure's primary purpose is not to transport

people or things, it is nonetheless a vessel if the structure's purpose necessitates transportation. Consequently, even though the dredge at issue was not "used *primarily* for th[e] purpose" of transportation, it was a vessel because *one* of its purposes was to move people and equipment over water. *Id.* at 495 (emphasis in original). Indeed, as this Court emphasized, the dredge could not have done its job "had it been unable to traverse the Boston Harbor, carrying with it workers like Stewart." *Id.*

This reasoning leaves the law regarding indefinitely moored floating structures functioning as extensions of land where *Stewart* found it. As *Stewart* itself explained, the critical inquiry for vessel status remains "whether [a structure's] use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." 543 U.S. at 496. That dichotomy is at most a reformulation of the purposive approach, leaving indefinitely moored floating structures that function as extensions of land no more as vessels than they were before. Although such structures are, like anything that can be towed, "theoretically" capable of moving people or things over water, this activity is not a "practical possibility" because they are not designed or used for any such purpose.

b. *Stewart*'s treatment of precedent confirms that it did not disturb the longstanding view that indefinitely moored floating structures that function as extensions of land are not vessels. *Stewart* expressly accepted the holdings of *Cope* and *Evansville*, both of which had held that such structures were not vessels. Those cases, this Court

explained, "did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore." *Stewart*, 543 U.S. at 493.

Stewart also endorsed the "dead ships" doctrine reflected in *Roper* and *West*, noting that even structures that were previously vessels "may lose their character as vessels if they have been withdrawn from the water for extended periods of time." 543 U.S. at 496. This is so even if there is a "remote possibility that they may one day sail again." *Id.* at 494. Permanent, "semi-permanent or indefinite" mooring, this Court reaffirmed, renders a structure "practically incapable" of serving as a means of maritime transport. *Id.* (quotation marks and citation omitted).

Lest there be any doubt that *Stewart* did not disturb the law regarding indefinitely moored structures, this Court also made a point to favorably reference a well-known decision from the Fifth Circuit on the subject. 543 U.S. at 494 (citing *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995)). In that case, the Fifth Circuit held that a floating casino, built on top of a barge and "moored to the shore in a semi-permanent or indefinite manner" by "lines tied to sunken steel pylons," was not a vessel. *Pavone*, 52 F.3d at 564, 570.[13] This was true even though, like petitioner's

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[13] A photograph of the floating casino is available at http://www.photoship.co.uk/jalbum%20ships/Old%20Ships%20B/slides/Biloxi%20Belle-01.html.

floating home, the structure had been towed multiple times over considerable distances.[14] It even had a contract with a company contemplating the possibility of future tows if necessary. *Id.* at 564. None of this movement, the Fifth Circuit explained, sufficed to render the structure a vessel because it was never "used as a seagoing vessel to *transport passengers, cargo, or equipment* across navigable waters. Neither was it originally constructed to do so." *Id.* at 564 (emphasis added).[15]

It cannot be that *Stewart*, despite endorsing all of these cases, somehow silently abrogated them. Yet under the Eleventh Circuit's "capability of tow" test, the *Cope* dry-dock, the *Evansville* wharfboat, the deactivated ship in *Roper*, and the floating casino in *Pavone* all would have been vessels. *Stewart* makes clear that this cannot be the law.

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[14] The structure was first towed from Morgan City, Louisiana, to Rockport, Texas (approximately 400 miles), and then to Corpus Christi, where it served "the express purpose of supporting a floating restaurant and bar." *Pavone*, 52 F.3d at 563-64. It remained at Corpus Christi for "a while," and then was moved to Aransas Pass, Texas, where it stayed in place for about two and one-half years. Next, the structure was converted into a casino and towed (about 600 more miles) to Biloxi, Mississippi. *Id.* It was later towed one last time – much like petitioner's home – due to a hurricane. *Id.*

[15] The Fifth Circuit has reaffirmed its analysis in *Pavone* in the wake of *Stewart*. *See De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir. 2006).

II. Conferring Vessel Status Upon Indefinitely Moored Structures Would Thwart Important Principles Of Maritime Law And Federalism.

Construing Section 3 to encompass indefinitely moored floating structures would subject floating homes, businesses, and related structures to a host of legal requirements and doctrines that do not properly apply to them. Further, treating such structures as vessels would unnecessarily burden the federal government, and would undermine principles of federalism by encroaching upon states' authority to regulate their shorelines.

A. Conferring Vessel Status Upon Indefinitely Moored Floating Structures Would Distort Maritime Law.

In determining whether structures constitute vessels, this Court has looked not only to Section 3 but also to "the purposes" of the substantive laws that Section 3 "is intended to subserve and the reasons on which [they] rest[]," *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 21-22 (1926). The term "vessel" must therefore be construed not only in light of the text of Section 3 and its history and precedent, but also in light of the myriad substantive laws to which vessels are subject. Several prominent examples of such laws make clear that Congress does not intend Section 3 to encompass indefinitely moored floating structures.

1. *The Maritime Lien Act.* The substantive federal law involved in this case well illustrates why indefinitely moored structures that function as

extensions of land should not be classified as vessels. The Federal Maritime Lien Act, 46 U.S.C. §§ 31341-43, creates a means of collecting on purported debts that is unheard of outside of maritime law. Specifically, the Act allows liens to attach to vessels "without notice" and permits putative creditors in certain disputes involving "vessels" to have them seized without giving the owner an opportunity to be heard. *Usher v. M/V Ocean Wave*, 27 F.3d 370, 374 (9th Cir. 1994). This "extraordinary remedy," *id.* at 373, exists to protect both vessels and their creditors. By providing a vessel the means "to obtain upon her own account needed repairs and supplies," a maritime lien allows the vessel to be self-reliant even though it is "usually absent from the home port, remote from the residence of her owners and without any large amount of money." *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920). At the same time, maritime liens "keep ships . . . from escaping their debts by sailing away." Thomas J. Schoenbaum, Admiralty & Maritime Law § 7-1, at 443 (4th ed. 2004) ("Schoenbaum on Admiralty").

The policies underlying the Maritime Lien Act have no bearing on stationary structures, such as floating homes, for they are never remote from their owners and cannot sail away from their debts. As this Court put the point long ago, a "maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters." *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 216 (1867). Indefinitely moored structures do not satisfy this test – even if they were previously towed in order to be set in place.

2. *The Limitation of Liability Act and other tort doctrines.* Maritime tort law likewise has a number of doctrines specially adapted to circumstances at sea. First and foremost, unlike defendants under state law – who ordinarily are liable for the entire amount of harm that they cause – most admiralty defendants have the extraordinary advantage of limiting their liability to "the value of the vessel and pending freight." Limitation of Vessel Owners' Liability Act, 46 U.S.C. § 30505. Maritime law also restricts the availability of reasonably foreseeable damages far more than does state tort law governing land-based accidents. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). The "great object" of the Limitation Act, and the reason for preserving the *Robins Dry Dock* principle while other tort law has grown more permissive, is "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 121 (1871) (Limitation Act); *see also Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022-29 (5th Cir. 1985) (*Robins Dry Dock* principle). In other words, limited liability encourages shipowners to engage in commerce that, due to the extraordinary risks involved, they would eschew if they were liable for the full extent of the harm that can result from maritime accidents.

But, as this Court already has observed, indefinitely moored floating structures that function as extensions of land do "not encounter perils of navigation to which craft used for transportation are exposed." *Evansville*, 271 U.S. at 22. They therefore neither convey the economic benefits, nor risk the crushing liabilities, that justify special tort protection for admiralty defendants. Accordingly, not only is

there "no reason" to limit liability for owners of indefinitely moored structures, *id.*, but it would be perverse to do so. Under the rule espoused by the Eleventh Circuit, for instance, a visitor suffering a debilitating accident on a floating home or business could be denied full recovery merely because the accident happened to occur on an immobile floating structure rather than on land a few yards away. Likewise, if a floating home caught fire due to owner negligence and burned down an entire marina, the owner could limit liability to a fraction of the damage. There is no justification for such results.

On the other hand, owners of vessels have various legal obligations that owners of land-based structures do not. Vessel owners owe a duty of "reasonable care under the circumstances" to every visitor lawfully aboard the vessel – a standard that may be higher than the duty owed with respect to land-based structures. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). They also are liable under the "salvage" doctrine to anyone who saves their vessel or its cargo "from impending danger or recover[s] [it] from actual loss, in cases of shipwreck, derelict, or recapture." *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 628 (1887) (quotation marks omitted). And in many circumstances, "[a]dmiralty tort plaintiffs can sue the vessel itself even when the owner has no liability." *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012, 1016 (7th Cir. 2006).

Some of these maritime tort doctrines favor defendants, while others favor plaintiffs. But the point is that all of these special admiralty rules have developed over time to address unique concerns

involved in maritime navigation and commerce – that is, the "problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70 (1967). Because accidents involving indefinitely moored floating structures have "nothing to do with the fact that [they are] afloat . . . rather than sitting on dry land," *Tagliere*, 445 F.3d at 1013, they are more suitably resolved by applying the local law governing accidents on land.

3. *The Jones Act and other legal protections for workers on vessels.* Various maritime statutes and doctrines, including the Jones Act, 46 U.S.C. § 30104, grant generous rights and legal remedies to certain employees, known as "seamen," who work aboard vessels.[16] Seamen are entitled to a "trilogy of heightened legal protections," comprising (1) the right to "maintenance and cure" for injuries incurred in the service of one's vessel; (2) the right to recover for an injury caused by a vessel's "unseaworthiness"; and (3) a cause of action for workplace injuries caused by the negligence not only of their employers but also of their fellow crew members. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). "[N]o other worker in our society can invoke such powerful relief

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[16] A "seaman" is "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G); *see also Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488 n.1 (2005). Whether a maritime worker is entitled to the generous rights and remedies afforded to seamen therefore depends, among other things, on whether he works on a vessel. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

in the event of an industrial accident." Schoenbaum on Admiralty § 4-8, at 214. Seamen are entitled to these protections "because of their exposure to the 'perils of the sea,'" *Chandris*, 515 U.S. at 354 – that is, "the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor." David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 80 (1985); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991) (seaman remedies are designed to "compensat[e] or offset[] the special hazards and disadvantages to which they who go down to sea in ships are subjected") (quotation marks omitted).

It makes no sense to bestow these legal protections upon employees who work on indefinitely moored structures that function as extensions of land. Yet if such structures are deemed to be "vessels," then waiters in floating restaurants, nannies on floating homes, and blackjack dealers in floating casinos will become "seamen." *See* OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), Occupational Safety & Health Admin., 2010 WL 1379699 (Enflex), at 14 (2010) ("OSHA 2010 Policy") (if floating casinos and similar structures are vessels, then those "whose work includes gaming or entertainment are considered to be seamen"); *Lunsford v. Fireman's Fund Ins. Co.*, 635 F. Supp. 72, 74 (E.D. La. 1986) (cleaning woman who worked three days a week on a yacht qualified as a seaman). Congress cannot have meant to confer seamen's uniquely generous protections upon such employees,

whose work is in no way meaningfully different than that of equivalent workers on land.

In particular, it is difficult even to imagine applying the unseaworthiness doctrine in this context. Seamen are entitled to recover for unseaworthiness when their vessel, its equipment, or appurtenances are not "reasonably fit *for their intended use*." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (emphasis added). But the intended use of indefinitely moored floating structures is to remain stationary. The doctrine of unseaworthiness cannot sensibly be applied to a structure that was never intended to be seaworthy in the first place.

4. *Federal maritime safety laws.* Vessels are subject to stringent federal safety laws and regulations. The Federal Boat Safety Act, which expressly displaces all state safety laws, charges the Coast Guard with creating regulations requiring recreational vessels to install or use "fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, lifesaving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment." 46 U.S.C. § 4301 *et seq.* In addition, federal law empowers the Secretary of Homeland Security to establish a system of inspections to enforce rules "to secure the safety of individuals and property on board [certain recreational and commercial] vessels." 46 U.S.C. § 3306. Among other things, the Department of Homeland Security must ensure that certain vessels are equipped with "proper appliances for lifesaving," have "suitable accommodations for the crew," and

have "an adequate supply of potable water." 46 U.S.C. § 3305.

Pursuant to this authority and invoking its expert judgment, the Coast Guard does not inspect "permanently moored craft" (PMC) because they do not constitute "vessels" under Section 3. Craft Routinely Operated Dockside, 74 Fed. Reg. 21,814-02 (May 11, 2009). To determine whether a structure is a permanently moored craft, the Coast Guard assesses the "totality of the circumstances," including: (1) whether the craft has "practical access to navigable water," (2) whether the craft is "affixed to the shore" by cables or utility lines, (3) whether the craft would be "endangered because of its construction" if it were operated in navigation, (4) the "purpose, function, or mission of the craft," and (5) whether "the craft can get underway in less than eight (8) hours." *Id.*

As the Occupational Safety and Health Administration – which has jurisdiction over floating workplaces that are *not* vessels – has made clear, indefinitely moored structures that function as extensions of land constitute "permanently moored craft" under the Coast Guard's test. "Typically," a PMC is a craft "being used as a theater, hotel, restaurant, museum, factory, gaming casino, chapel, storage facility, or similar type of use." OSHA 2010 Policy, at 16. Petitioner's floating home had the same essential attributes as these other kinds of structures. The "purpose, function, or mission" of the home was to provide a stationary residence, not to engage in maritime transportation; it was "affixed to the shore" by utility and power lines; it took significant amounts of time to prepare for being

towed; and it was "endangered because of its construction" when towed. It thus was ineligible for Coast Guard certification. Pet. App. 20a.

The Eleventh Circuit's definition of "vessel," however, would require the Coast Guard to oversee at least some indefinitely moored floating structures (and OSHA to relinquish jurisdiction over such structures that are workplaces). Not only would such a change in the law require a reallocation of governmental resources, but it would subject structures not engaged in maritime transportation to all sorts of regulations that are inappropriate for them. Stationary structures, for instance, could be required to install "navigational equipment" and "grab-rails," and the Department of Homeland Security would be tasked with inspecting such structures' nonexistent crew accommodations and potable water supplies. It strains credulity to imagine that Congress intended such results.

B. Treating Indefinitely Moored Floating Structures As Vessels Would Contravene Principles of Federalism.

This Court has explained that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). It accomplishes this objective by providing a regime of uniform rules for structures that travel between the states and are not subject to any single state's jurisdiction. The law thereby ensures "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States." *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). Indefinitely moored

floating structures, however, have no implications for maritime commerce. Treating indefinitely moored structures as "vessels" thus would unnecessarily burden the federal courts and undermine important principles of federalism reflected in existing law.

1. There is no federal interest in governing floating structures uniformly across all fifty states when those structures are functionally extensions of land. Given that such structures do not transport people or goods between the states, no interstate commercial interests would be served by requiring every dispute involving such structures to be heard in federal court. As Professor Rutherglen notes: "Just as dead men tell no tales, dead ships pose no threat to admiralty jurisdiction." George Rutherglen, *Dead Ships*, 30 J. Mar. L. & Com. 677, 682 (1999). The same is true of indefinitely moored structures that were never ships to begin with.

That such structures are not vessels does not mean that disputes involving them will never come under maritime jurisdiction. It simply means that they will not *automatically* come under maritime jurisdiction. That is, while vessel status is generally sufficient to trigger maritime jurisdiction, maritime jurisdiction may attach in other ways. *See* Schoenbaum on Admiralty § 1-6, at 36. For example, if a floating structure indefinitely affixed to shore were struck by a vessel, then admiralty jurisdiction would attach under the Admiralty Extension Act, 46 U.S.C. § 30101. Or if a non-vessel were involved in an accident while being pulled over (navigable) water, admiralty tort jurisdiction would again be appropriate. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

Petitioner's point, therefore, is simply that admiralty jurisdiction should not attach indiscriminately to all floating structures capable of being towed at some point. It is appropriately exercised only when the matter at issue somehow implicates the "commerce lying at the heart of the admiralty court's basic work." *Id.* at 533.

If the law were otherwise, federal courts would become responsible for cases that implicate no federal interest. Virtually any tort or contract dispute involving a "vessel," for example, comes under the exclusive jurisdiction of the federal courts. *Grubart*, 513 U.S. at 534 (torts); *Kossick v. United Fruit Co.*, 365 U.S. 731, 735-36 (1961) (contracts). While such broad jurisdiction may be necessary with respect to structures that transport people and goods over water, it would be a waste of the federal judiciary's limited resources to preside over disputes regarding indefinitely moored structures. Indeed, this case, which is basically a landlord-tenant dispute, aptly demonstrates that reality. Petitioner's floating home is far removed from interstate commerce and only about $3000 is at stake. Yet the district court was required to preside over months of bitter wrangling between the parties that culminated in a full-blown bench trial at which petitioner proceeded *pro se*.

2. Removing indefinitely moored floating structures from the purview of state law (or even simply adding a layer of federal law on top of that law) would also thwart federalism interests by usurping traditional state functions. Local regulation is the default in our federal system: states generally have regulatory authority over local matters because "decentralized decision making is

better able to reflect the diversity of interests and preferences of individuals in different parts of the nation." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987). Regulating local homes and businesses and prescribing compensation for tort victims are among states' most traditional prerogatives. Federal regulation in these realms with respect to indefinitely moored floating structures would serve little purpose, while "encroach[ing] on a regulatory domain that might well be thought to belong more properly to state courts and legislatures than to federal admiralty courts." *Tagliere*, 445 F.3d at 1015.

For example, many states have homestead protections preventing the forced sale of homes to satisfy creditors. Powell on Real Property § 18.03 n.8 (Michael Allan Wolf ed., 2011). Homestead laws embody states' determination that homeowners should not be stripped of their residences to satisfy debts. Indeed, Florida's homestead protection is enshrined in the state's constitution. Fla. Const. art. X, § 4; *see also Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28, 31 (Fla. 1956) ("No policy of this State is more strongly expressed in the constitution, laws and decisions of this State than the policy of our [homestead] laws."). Homestead laws promote stability by allowing homeowners to live beyond the reach of financial misfortune. *See Miami Country Day Sch. v. Bakst*, 641 So. 2d 467, 468-69 (Fla. App. 1994).

But in a federal maritime action, creditors have recourse to the extraordinary remedy of a maritime lien on any "vessel." Again, this case illustrates how

admiralty law, carelessly applied, may preempt a state's judgment regarding the protections due to an indebted homeowner. Had the dispute here been left to state law, Florida's constitution would have protected petitioner's home from the extraordinary seizure and conversion that took place. Instead, the home was arrested and auctioned against his will because the district court and the Eleventh Circuit considered it to be a vessel to which a maritime lien could attach.

Further, different states regulate structures that occupy their shorelines according to varying historical and geographical preferences. *See, e.g.*, Shoreline Management Act of 1971, Wash. Rev. Code § 90.58.010-020 ("[C]oordinated planning is necessary in order to protect the public interest associated with the shorelines of the state . . . ."). Some states and municipalities, in fact, have adopted laws and ordinances specifically governing floating homes. Seattle, for example, has a detailed ordinance to protect "the stability, viability, and fiscal integrity of Seattle's unique floating home communities by preventing the eviction of floating homes from their moorages through arbitrary actions." Seattle Municipal Code § 7.20. In Idaho, the Floating Homes Residency Act provides owners of certain floating homes with different kinds of "protection from actual or constructive eviction." Idaho Code § 55-2702. Such policies are tailored to local priorities in a manner not replicable by a one-size-fits-all federal regime. Because states are already effectively managing their shorelines – including indefinitely moored floating structures – there is no need to frustrate states' self-governance through the introduction of federal maritime law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,
v.
THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Does a houseboat that was towed several times over hundreds of miles and then moored with deteriorated ropes in a public marina, where it received power through a 50-amp extension cord and water through a garden-type hose, constitute a "vessel" under 1 U.S.C. § 3, thus supporting federal admiralty jurisdiction?

PARTIES TO THE PROCEEDINGS

In the district court, respondent City of Riviera Beach, Florida, was the plaintiff and petitioner Fane Lozman's houseboat was the *in rem* defendant. Petitioner, asserting his ownership of the defendant houseboat under Federal Rule of Civil Procedure Supplemental Rule C(6)(a), appeared in the district court as "claimant" (*e.g.*, Supp. R. E(2)(a)).

In the court of appeals, petitioner was the appellant and respondent was the appellee. The U.S. marshal sold the defendant houseboat at a judicial sale under Federal Rule of Civil Procedure Supplemental Rule E(9)(b), shortly before the notice of appeal was filed and the houseboat was subsequently destroyed. It was not a party in the court of appeals.

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INTRODUCTION

Congress defined "vessel" in 1 U.S.C. § 3 to mean "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." In *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 496 (2005), this Court construed § 3 as a test of "practical possibility."

The Eleventh Circuit properly upheld the district court's exercise of admiralty jurisdiction, because petitioner's houseboat amply demonstrated both actual use and practical capability for maritime transportation. The houseboat had been towed hundreds of miles. Its mooring in respondent's marina under a wet-slip agreement required that the watercraft be capable of leaving the marina on three days' notice and proceeding to another destination on navigable waterways.

The court below correctly rejected as legally irrelevant what little evidence petitioner proffered, because it did not address the practical-capability requirement of § 3. In this Court, petitioner abandons his previous arguments and asks the Court to divine the houseboat's "purpose" based on his asserted desire to stay at the marina "indefinitely" and to transform the houseboat into a purported "extension of land." But petitioner had no property or contractual right to an indefinite moorage, and his subjective intent is irrelevant to the objective practical capabilities of his vessel. Moreover, the connections to the dock were so flimsy that the houseboat could – and did – depart the marina in a matter of minutes. Petitioner's houseboat therefore bears no resemblance to dry-docks or wharfboats with connections to land that make maritime transportation impracticable. Because enforcing maritime

liens for dockage services and maritime torts is a classic invocation of *in rem* jurisdiction, the judgment below should be affirmed.

STATEMENT

A. Legal Background

This case concerns whether federal admiralty jurisdiction extends to an *in rem* action against petitioner's houseboat. Respondent sought to enforce a maritime lien against the houseboat itself *in rem*, rather than bring an *in personam* action against petitioner. Petitioner then defended the action as "claimant." *See generally, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 586-688 (2d ed. 1975) ("GILMORE & BLACK") (describing maritime liens, *in rem* actions, and related issues).

The judicial power of the United States extends to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Under the so-called saving-to-suitors clause, 28 U.S.C. § 1333(1), state courts have concurrent jurisdiction over almost all maritime cases. *See, e.g., Madruga v. Superior Court*, 346 U.S. 556, 561-62 (1954). But federal district courts sitting in admiralty have exclusive jurisdiction over maritime *in rem* actions. *See, e.g., The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427-31 (1867).

In 1910, Congress enacted the Federal Maritime Lien Act ("FMLA") to provide a uniform federal statute governing maritime liens for the provision of necessaries to vessels. *See* Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604, 604 ("any person furnishing repairs, supplies, or other necessaries . . . to a vessel . . . shall have a maritime lien on the vessel which may be enforced by a proceeding in rem"). The FMLA preempted state laws that had governed maritime liens and "provided a series of simple and

comprehensive rules" designed to "aid . . . those who supply necessaries to ships." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 272-73 (1940). One of those rules gave suppliers of necessaries an *in rem* remedy against the vessel itself to secure payment of charges. *See generally, e.g.*, GILMORE & BLACK 622. "Necessaries" includes "wharfage and dockage." 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-3, at 703 (5th ed. 2011).

Over a century later, the current FMLA, 46 U.S.C. §§ 31341-31343, remains essentially unchanged. It provides that "a person providing necessaries to a vessel on the order of the owner . . . (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel." *Id.* § 31342(a).

In the present case, both admiralty jurisdiction and the maritime lien's substantive validity required petitioner's houseboat to be a "vessel," which Congress defined as "includ[ing] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.[1] Thus, the central question in this case is whether petitioner's houseboat was "used, or capable of being used, as a means of transportation on water."

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[1] When Congress recodified Title 46 (which includes the FMLA) in 2006, it provided that, "[i]n this title, the term 'vessel' has the meaning given that term in [§ 3]." 46 U.S.C. § 115. Section 3 has defined "vessel" in the same terms (except for a minor change in punctuation) since 1873. *See* Rev. Stat. § 3 (1873).

This Court recently examined § 3's "vessel" definition in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), which held that a dredge – a floating platform with a bucket that removes silt from the ocean floor – was a vessel under § 3. The *Stewart* Court explained that the statute requires "practical," as opposed to "merely a theoretical," capability. *Id.* at 496. The relevant issue accordingly is "whether the watercraft's use as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* Merely theoretical capability arises when a watercraft "has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494.

Stewart rejected the view that vessel status turns on "primary purpose" or intended use. *See id.* at 497. It also rejected the view that "a structure's locomotion at any given point matter[s]." *Id.* at 496. "Under § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497. In other words, § 3 "requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." *Id.* at 495.

B. Factual Background

Petitioner purchased the houseboat at issue in 2002. (It is pictured most clearly at JA69. Other pictures – interior and exterior – are at JA12, 31-33, 44-66.) The bill of sale described it as a "Homemade Custom Houseboat/Barge" purchased for $17,000. JA79. The houseboat was then located near Fort Myers, on Florida's west coast. JA70-71. Petitioner towed it to North Bay Village on Florida's east coast

(JA71), a distance of more than 200 miles (App. 3a). While in North Bay Village, petitioner moved the houseboat multiple times, docking temporarily at three different marinas as circumstances changed. JA71-72, 77-78.

In 2006, Hurricane Wilma destroyed the marinas and most of the vessels in North Bay Village, but did not damage petitioner's houseboat. JA78. He therefore moved it yet again. Using a 30-foot motorboat, petitioner towed the houseboat to Riviera Beach (JA73-74) – a distance of approximately 70 miles (JA83; App. 19a n.9). To facilitate that journey, a building contractor installed four new towing cleats on the houseboat. JA86; App. 19a n.9.

Petitioner contracted with the Riviera Beach Marina ("Marina"), which is owned and operated by respondent, to dock his houseboat there. The Marina, situated on the Atlantic Intracoastal Waterway, provides wet and dry storage for approximately 510 commercial and recreational vessels. *See* Affidavit of Edwin C. Legue ¶¶ 5-6 (July 31, 2009) ("Legue Aff.") (D.C. Dkt. 80-1). Commercial vessels occupy roughly 15% of the Marina's wet slips. *Id.* ¶ 7. A quarter of the Marina's dockage revenue comes from transient vessels that dock at the Marina for less than 10 days while en route to other destinations. *Id.* ¶ 9.

The "Wet-Slip or Dry Storage Agreement" that petitioner signed (JA13-21) permitted him to use a "wet slip" in exchange for a fee. The Agreement referred generally to petitioner's houseboat as a "vessel" (JA13-20) or "boat" (JA13-19), and more specifically described it as a "Houseboat" (JA13).

The Agreement did not entitle petitioner to occupy any particular space at the Marina. The "assigned space" clause instead provided:

> Owners of vessels assigned slips, moorings, or dry-storage spaces as may be specifically designated by the City at Marina facilities agree to relinquish their berth when requested by the City. . . . [T]he City may at any time, in its absolute discretion, require the Owner to remove the vessel from its assigned storage area to another storage area within the Marina, and if the Owner fails to comply, the City shall have the right to move the vessel itself.

JA13-14. The Agreement noted that respondent would have a maritime lien on the vessel:

> In addition to any other remedies provided for in this Agreement, the Marina, as a provider of necessities to this vessel, has a maritime lien on the vessel and may bring a civil action *in rem*, under 46 United States Code 31342 in Federal Court, to arrest the vessel and enforce the lien and shall not be required to allege or prove in such action that credit was given to the vessel.

JA15. Petitioner agreed "to abide by . . . any additional rules which from time to time may be conspicuously posted on the premises." JA17. Finally, the termination clause provided:

> This Agreement may be terminated upon any of the following conditions:
>
> * * *
>
> By written notice of termination by the City delivered to the owner at the address specified at least three (3) days prior to the effective date of termination. The Owner hereby agrees to remove

> the vessel from the City's premises by the date specified.

Id.

While at the Marina, petitioner moored the houseboat using rope lines (pictured at JA32). An independent surveyor described the lines as "deteriorated, hanging in the water," and noted that they were "not sufficient to prevent the craft from breaking loose." JA32. The houseboat –

- received electricity through a single, 50-amp extension cord (pictured at JA33) that was plugged into an outlet on the dock, JA33;
- received water through a hose (pictured at JA33), comparable to an ordinary garden hose, which was connected to a spigot on the dock, JA31;
- was not connected to a land-based sewer line; petitioner simply pumped raw sewage overboard while he lived at the Marina, *see* Cert. Opp. 7-8 (quoting Deposition of Fane Lozman 52:17-53:19 (Aug. 25, 2009) ("Lozman Dep.") (D.C. Dkt. 98-2));
- had a satellite dish (pictured at JA12, 69) for television reception.

Finally, the dock had a telephone jack on the same box as the power outlet (pictured at JA33), and petitioner could have used that jack for telephone or internet service.

In June 2007, the Riviera Beach City Council unanimously adopted a revised dockage agreement that required all vessels to: (1) secure and maintain liability insurance to specified limits and to name the Marina as an additional insured; (2) show proof of valid registration or documentation; (3) be operational and capable of vacating the Marina in case of an

emergency; and (4) comply with the Florida Clean Vessel Act, Fla. Stat. § 327.53, which, among other things, prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.[2] The resolution did not provide for use of the Marina by any watercraft other than vessels, and the Marina itself reserved no space for permanently moored craft.

Nine months later, respondent hired an independent surveyor to determine which vessels at the Marina had not complied with the revised regulations. Approximately a dozen vessels, including petitioner's houseboat, were non-compliant.[3] Every other non-compliant vessel, with the sole exception of petitioner's houseboat at issue here, either corrected the deficiencies or left the Marina. Legue Aff. ¶ 25. Petitioner failed to comply and did not sign the new agreement, despite multiple requests that he do so. *E.g.*, JA25-27. In April 2008, respondent informed petitioner that he had missed the extended deadline to execute a new agreement and that respondent would enforce its rights against the vessel. JA28-29. When petitioner still failed to comply, respondent instructed petitioner to remove his houseboat from the Marina by April 1, 2009. JA34-35. It also advised petitioner that he had an outstanding balance of $2,537.83 for unpaid dockage. *Id.* Petitioner neither

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[2] The following month, respondent notified its customers of the new requirements, along with the new agreement, which was to be executed by September 30, 2007. JA25-26.

[3] Among those vessels was a second houseboat owned by petitioner, the *And Triumphant*. He removed it from the Marina upon notice of its non-compliance. *See* Lozman Dep. 27:10-17, 29:16-30:23. The *And Triumphant* is pictured at JA31 (described as "Yellow & White House Boat").

executed the new agreement nor removed his houseboat from the Marina.

C. Procedural Background

1. District court proceedings

Complaint. Respondent instituted the present *in rem* action against petitioner's houseboat to execute maritime liens for necessaries under 46 U.S.C. § 31342 and for maritime trespass. The district court issued a warrant for the houseboat's arrest. The U.S. marshal executed that warrant and towed the houseboat (JA69), still containing some of petitioner's personal property (JA68),[4] from Riviera Beach to Miami.

In Miami, a surveyor inspected the houseboat and reported that "the vessel had been towed approximately 80 nautical miles, [and] there were no observations to indicate recent damage from this tow." JA39. He estimated the market value, "based primar[il]y on [the] condition of the structure," as "between $5,000.00 and $7,500.00." JA43. He noted a number of maintenance problems, e.g., "[w]ater had collected in the bilge spaces," "the surface of the plywood evidenced deterioration and rot," and "[b]ilge pumps and automatic float switches previously installed in the bilge had been . . . neglected and were non-functional." JA38.

Motions to dismiss. Petitioner moved to dismiss, arguing that his "floating structure" was not a "vessel." Emergency Mot. To Dismiss Pl.'s Verified Compl. 1-2 (Apr. 21, 2009) (D.C. Dkt. 9). The court denied the motion without prejudice but permitted petitioner "to enter the vessel . . . to obtain his personal belongings." JA68.

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[4] Some of the personal property carried on the houseboat to Miami is pictured at JA45-46, 55, 57-66.

Petitioner subsequently filed a new motion to dismiss "for lack of subject matter jurisdiction," again arguing that his "floating residential structure" was not a vessel. Claimant's Mot. To Dismiss Pl.'s Verified Compl. 1 (July 27, 2009) (D.C. Dkt. 64). He acknowledged that federal courts have jurisdiction over vessels and that houseboats are vessels, *id.*, but contended that his structure was not a vessel because it would be "damaged when . . . moved in the water any considerable distance," *id.* at 2. He further argued that the houseboat was constructed with land-based building materials, *id.*; had no means of propulsion, *id.* at 2-3; did not have a Hull Identification Number ("HIN"), *id.* at 3-5; and was not a vessel under Florida law, *id.* at 5-9.

Partial summary judgment motion. Independently of petitioner's then-pending motion to dismiss for lack of subject-matter jurisdiction, respondent moved the following month for partial summary judgment on the maritime trespass claim. *See* Pl.'s Mot. for Partial Summ. J. (Aug. 21, 2009) (D.C. Dkt. 80). Respondent argued that there were no genuine disputes of material fact regarding the termination of petitioner's right to dock his houseboat at the Marina. Because the houseboat had remained at the Marina, it was liable for trespass and a maritime lien arose in respondent's favor.

In response, petitioner contended that he had not trespassed. He identified several allegedly disputed facts ranging from ownership of the Marina to respondent's motives for enacting the revised rules and regulations. *See* Claimant's Response to Pl.'s Mot. for Partial Summ. J. 3-7 (Sept. 15, 2009) (D.C. Dkt. 100). Petitioner also disputed the amount of damages under the maritime trespass claim and the

amount of any unpaid dockage fees. *Id.* at 7-9. Although he twice described respondent's "vessel" characterization of the houseboat as a disputed fact, petitioner identified no fact on this issue that was in dispute.[5] He stated simply:

> 8. Contrary to CITY's assertion in its undisputed fact #17, the defendant in this action is not a vessel as alleged by the CITY. It is a floating residential structure as recognized by Florida Statute. . . .
>
> * * *
>
> 12. Contrary to CITY's assertion in "undisputed" fact #22, LOZMAN does not have a vessel but rather he has a floating residential structure.
>
> . . .

Id. at 5-6. Additionally, petitioner argued that the Marina's actions were in retaliation for his protected political activities. *Id.* at 12-20.

District court rulings. The district court denied petitioner's motion to dismiss for lack of subject-matter jurisdiction. *See* Order (Sept. 11, 2009) (D.C. Dkt. 103).[6] The court did not decide at that time whether petitioner's houseboat was a "vessel," noting "a factual dispute" on the question. Add. 1-2. It held simply that respondent's allegations were sufficient to withstand the motion to dismiss. Add. 2.

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[5] Petitioner raised additional issues in Claimant's Surreply to Plaintiff's Motion for Partial Summary Judgment (Oct. 5, 2009) (D.C. Dkt. 127) ("Claimant's Surreply"), but the district court struck the surreply because it was filed without leave and in violation of the Local Rules. App. 47a-49a.

[6] Because that district court order was omitted from the petition appendix and joint appendix, it is reprinted in the addendum to this brief ("Add.").

More than two months later, the court granted respondent's motion for partial summary judgment on the maritime trespass claim. App. 33a-49a. The court also explained in greater detail that it had subject-matter jurisdiction. App. 38a-42a. As part of that analysis, it held that petitioner's houseboat was indeed a "vessel." App. 40a-42a. That determination turned on "whether the boat 'was rendered practically incapable of transportation or movement,'" App. 40a (quoting *Board of Comm'rs v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)); "on a boat's capability of maritime transport, rather than its primary or present use, or the owner's intent," *id.* (citing *Belle of Orleans*, 535 F.3d at 1310); and "on 'whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one' and whether the vessel was '"rendered practically incapable of transportation or movement,"'" App. 41a (quoting *Belle of Orleans*, 535 F.3d at 1310, 1312, quoting in turn *Stewart*, 543 U.S. at 494). In applying the governing principles, the court noted that there had been a factual dispute on vessel status but concluded that petitioner had offered "no evidence" to support his assertions. *Id.* Finally, the court found that petitioner's houseboat was trespassing because it was "undisputed that the Defendant vessel remained at the marina after the City terminated consent." App. 43a.[7]

Trial. The next week, the district court held a two-day bench trial to resolve remaining issues, including damages on the trespass claim and both liability and damages on the dockage claim. In its final judgment,

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[7] The district court also found that petitioner had failed to demonstrate that respondent's actions were retaliatory. App. 45a-46a.

the court awarded $1 nominal damages for maritime trespass and $3,039.88 for dockage.

After petitioner failed to post bond, the court ordered the sale of the houseboat in satisfaction of the judgment. *See* Order (Feb. 26, 2010) (D.C. Dkt. 187). Because petitioner bid less than respondent's credit-bid,[8] respondent obtained title. *See* Bill of Sale (filed Mar. 10, 2010) (D.C. Dkt. 190).[9]

2. Eleventh Circuit appeal

Petitioner appealed, principally on the ground that the district court lacked admiralty subject-matter jurisdiction because his houseboat was not a "vessel."[10] *See* Pet'r C.A. Br. 12-26. That jurisdictional argument relied on four overlapping contentions. Petitioner asserted first that his houseboat was not capable of being used as a means of transportation over water under the criteria applied in *Belle of Orleans* and *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864 (11th Cir. 2010). *See* Pet'r C.A. Br. 13-16, 22-25. Second, the houseboat was constructed using the same type of building materials as are used on land. *Id.* at 16-17, 23. Third, it lacked both an HIN and

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[8] This Court recently addressed credit-bids in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012).

[9] Respondent's subsequent attempts to sell the houseboat were unsuccessful. Habitat for Humanity and AMVETS refused to accept it as a donation. Faced with the high costs of keeping the houseboat, respondent destroyed it.

[10] Petitioner also argued that he "was never behind in his rent," Pet'r C.A. Br. 27; that respondent filed this action to retaliate against petitioner for exercising his First Amendment rights, *id.* at 31-33; and that respondent was estopped from asserting a maritime lien, *id.* at 32-34. The Eleventh Circuit rejected petitioner's additional arguments, *see* App. 11a, 21a-32a, and petitioner does not renew them here.

Coast Guard certification. *Id.* at 17-18, 24-25. Finally, it was not a vessel under Florida law. *Id.* at 19-24.

The Eleventh Circuit affirmed in all respects. In holding that petitioner's houseboat was a vessel subject to admiralty jurisdiction, the court explained "that the primary inquiry in determining whether a craft is a vessel is whether the craft was 'rendered practically incapable of transportation or movement.'" App. 13a (quoting *Belle of Orleans*, 535 F.3d at 1312, quoting in turn *Stewart*, 543 U.S. at 494). The court further explained that its analysis "echoed the Supreme Court's pronouncement in *Stewart* . . . that the determination of whether a craft is a 'vessel' focuses on 'whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.'" *Id.* (quoting *Stewart*, 543 U.S. at 496). The court then looked to "the capability of the craft, 'not its present use or station.'" *Id.* (quoting *Belle of Orleans*, 535 F.3d at 1310). Finding that petitioner's houseboat was "practically capable of transportation over water by means of a tow," App. 21a – as demonstrated by making "actual voyages . . . under tow," App. 18a – the court concluded that petitioner's houseboat was a vessel under § 3.

The Eleventh Circuit rejected each of petitioner's arguments in turn. "The record disputes [petitioner's] characterization [that the houseboat was not capable of transportation over water]," App. 17a, because "[petitioner's houseboat] *was* towed several times over considerable distances," App. 18a. The court further rejected petitioner's claim that the houseboat required emergency repairs during any of its actual voyages because there was not a "shred

of evidence" in the record of any such damage or repairs. *See id.*[11]

The Eleventh Circuit also rejected for lack of "any record support" petitioner's argument that his houseboat had been constructed using land-based building materials. App. 18a-19a. "The fact that [petitioner's houseboat] was an unusually designed craft is relevant only to the extent that the design prevents it from having any practical capacity for transportation over water." App. 19a. Reiterating that "the record is clear that [petitioner's houseboat] had this practical capacity," the court found the houseboat's design to be "of little moment." *Id.* Moreover, the court observed "that a houseboat 'affords a water-borne place to live with the added advantage of at least some maritime mobility.'" App. 15a (quoting *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968)). To the extent that petitioner's argument relied "on the intent of the shipowner," the court found it inconsistent with *Stewart*. App. 16a (internal quotations omitted).

The Eleventh Circuit found the lack of an HIN and Coast Guard certification to be irrelevant because "the craft's practical capacity for maritime transport" is the test for vessel status, not "legal navigability." App. 20a.

Finally, the court held that petitioner's state-law arguments "miss the point" because "[f]ederal law governs the existence of admiralty jurisdiction, and

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[11] Alternatively, even if petitioner's houseboat had suffered damage under tow, the court concluded that would not be enough to defeat vessel status. App. 18a (citing *Belle of Orleans*, 535 F.3d at 1312).

the term 'vessel' is specifically defined in [§ 3]." App. 12a n.6.

SUMMARY OF ARGUMENT

I. Section 3 defines a "vessel" as any "artificial contrivance" that is "used, or capable of being used," for water "transportation." 1 U.S.C. § 3. Petitioner's own definitions demonstrate § 3's breadth; they show that an object is "capable" of performing any task its attributes permit. A craft is "capable" of maritime transportation, therefore, if it has the practical ability to carry people or things over water. Had Congress wanted to restrict § 3 to structures intended for maritime transportation, it would have said so, as it did in statutes defining "vessel" in other contexts.

This Court's holding in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), confirms that § 3's plain language controls. Although *Stewart* recognized that some structures could be non-vessels because of their moorings, it held that a structure's moorings are relevant only when they affect its practical capacity for waterborne transportation. The question "in all cases" is not what a structure's moorings signal about its owner's intent, but whether its use for maritime transportation "is a practical possibility." *Id.* at 496.

II. Interpreting § 3 in accordance with its plain language comports with this Court's preference for clear and simple jurisdictional rules, which conserve judicial resources and enhance predictability. A practical-capability test is easy to apply. In most cases, a watercraft that can float, carry objects, and be towed over water will qualify as a "vessel." The administrative simplicity of this approach outweighs petitioner's speculative concerns, which are overblown in any event, that it might sweep in some exotic structure.

By contrast, petitioner's amorphous "purposive" test would spawn confusion and gamesmanship. Petitioner's proposed tests have morphed several times during this litigation, but he has never explained how courts should determine a watercraft's "purpose." Because petitioner's approach would actually turn on an owner's subjective intent, it would prove difficult to apply, allowing a watercraft's owner to maneuver his craft in and out of vessel status.

The Government's proposed test is also unworkable. The majority of the Government's argument supports the Eleventh Circuit's holding. The only objectively verifiable factors that the Government identifies bear on a watercraft's practical capability. The Government correctly repudiates any reliance on an owner's subjective intent. But by suggesting consideration of a craft's amorphous "purpose" in addition to its objectively verifiable physical attributes, the Government invites a confusing multi-factor balancing test that strays from the statutory text and conflicts with this Court's stated preference for simple jurisdictional rules.

III. Petitioner offers no good reason to depart from § 3's plain language and misreads the general maritime law as supporting an interpretation of § 3 that conflicts with the statutory text. Early admiralty cases took divergent approaches to vessel status, and the mere fact that some cases appeared to employ a "purposive" approach does not suggest that Congress silently imported such an approach into § 3.

This Court also should disregard petitioner's policy arguments. Not only do those arguments conflict with § 3's text, but they fail on their own terms. Excluding from admiralty jurisdiction watercraft that are practically capable of maritime transportation

would contravene important federal policies, including those that underpin the FMLA. Because those policies concern the regulation of activity on navigable waterways, they outweigh any competing local interests.

IV. This Court should affirm the Eleventh Circuit's judgment. That court correctly applied the practical-capability test and concluded that the "record [was] clear" that petitioner's houseboat retained the "practical capacity" for waterborne transportation. App. 19a. The record supports the Eleventh Circuit's holding. The houseboat's repeated maritime voyages – and its flimsy attachments to the land – refute petitioner's assertion that it was "indefinitely moored." And petitioner had no contractual or property right to keep his houseboat moored indefinitely in respondent's Marina. In such circumstances, a remand would be pointless.

Further, the record supports affirming the Eleventh Circuit's judgment even under petitioner's proposed theory. Far from functioning as an "extension of land," petitioner's houseboat was objectively intended to offer him the "advantage of . . . maritime mobility." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968). Petitioner took advantage of that mobility on multiple occasions, and he docked his houseboat in a marina from which respondent could expel it with little notice.

Finally, the procedural posture of this case requires affirmance. Petitioner challenges only the district court's subject-matter jurisdiction over respondent's claims. Because vessel status is relevant both for jurisdiction and the merits, respondent's burden of demonstrating vessel status was modest. Under any theory, respondent satisfied that burden.

ARGUMENT

I. A VESSEL UNDER § 3 IS ANY STRUCTURE PRACTICALLY CAPABLE OF MOVING PEOPLE OR THINGS OVER WATER

A. Section 3's Plain Language Conditions Vessel Status On A Craft's Use Or Capability

1. The interpretation of § 3's definition of "vessel" must begin "with the language employed by Congress." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotations omitted). Section 3 confers vessel status on any "artificial contrivance" that is "used, or capable of being used," for water "transportation." 1 U.S.C. § 3. That language contemplates two categories of vessels: those actually "used" for maritime transportation and those merely "capable" of such use. The latter category must encompass some structures that the former excludes; interpreting the statute otherwise would disregard the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted).

A watercraft is "capable" of being used for maritime transportation if its physical characteristics allow such use. When Congress enacted § 3 in 1873, "capable" meant "[e]ndued with power competent to the object." 1 Noah Webster, *An American Dictionary of the English Language* (1828). That definition has not changed: "capable" today means "having sufficient power . . . or other needed attributes to perform or accomplish" a task. *Webster's Third New International Dictionary* 330 (2002) (giving as an example "ships [capable] of facing the heavy seas"); *see Random House Unabridged Dictionary* 308 (2d

ed. 1993) (defining "capable of" as "having the ability or capacity for"). An object's capability, therefore, depends not on its inherent purpose but on its physical attributes; it is "capable" of anything that those attributes permit.[12]

Petitioner's proffered definitions reinforce that conclusion. He states that "capable," in 1873, meant "[p]ossessing ability, qualification, or *susceptibility*; having capacity; adapted; *suited*." Pet. Br. 20 n.7 (quoting dictionary) (emphases his). The very words that petitioner italicizes – "susceptibility" and "suited" – demonstrate that § 3 sweeps broadly. A structure can be "susceptible" of many uses not contemplated by its creator. *See* 1 Webster, *An American Dictionary* (defining "capable" as "susceptible of: as, a thing is *capable* of long duration; or it is *capable* of being colored or altered"). So too can it be "suited" for more than its intended or current use. *See Webster's New International Dictionary* 2522 (2d ed. 1950) ("suit" means to "answer the requirements or demands of" or to be "convenient for, good for"). Those words indicate, along with petitioner's other definitions,[13] that an object's capability is distinct from – and broader than – its intended purpose.

Everyday experience confirms that many objects are "capable" of being used for purposes other than those for which they were intended. *Cf. Mohamad v.*

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[12] That does not mean that any contrivance that can float is a vessel; it must also be practically capable of carrying people or things over water. *See infra* p. 30.

[13] *See* 2 *Oxford English Dictionary* 856 (2d ed. 1989) (defining "capable" as "[h]aving the needful capacity, power, or fitness for (some specified purpose or activity)" and illustrating with statement "You are capable of better things"); *id.* ("of a nature, or in a condition, to allow or admit of").

Palestinian Auth., 132 S. Ct. 1702, 1707 (2012) (looking to "everyday parlance" to inform meaning of statutory term). As campers can attest, newspapers are "capable" of being used as kindling (or, for that matter, packing material). Carving knives – although designed for culinary preparation – are "capable" of being used to inflict bodily harm. Few would maintain that those household objects are "capable" of being used for *only* their intended functions. *Cf. Sea Village Marina, LLC v. 1980 Carlcraft Houseboat*, 2010 AMC 404, 419 (D.N.J. 2009) ("The word 'capable' is often used to contrast ability from intention."). Similarly, a watercraft is "capable of being used" for maritime transportation, in ordinary parlance, if its physical attributes allow it to carry things over water.

2. Section 3 gives no indication that Congress intended to deviate from the ordinary meaning of "capable." The Government argues (at 18-19) that "contrivance" refers only to things that are "made (or adapted) with a design or purpose." To be sure, § 3 applies only to man-made objects (thus excluding, for example, driftwood). *See* 1 Webster, *An American Dictionary* (defining "artificial" as "[m]ade or contrived . . . by human skill"; "contrive" means "[t]o invent" or "to devise"). A man-made object's design for *some* particular purpose, however, has little bearing on whether it is "capable of being used" for *other* purposes.

Nor does the term "transportation" alter the plain meaning of "capable." A watercraft serves as a means of "transportation" whenever it performs an "act of carrying or conveying from one place to another." *Id.* In most cases, such "transportation" will involve conveying "things or persons." 18 *Oxford*

English Dictionary 424. But a watercraft need not *actually* transport people or things over water to attain "vessel" status under § 3 – it need only be "capable" of doing so. Thus, petitioner's observation (at 18) that "[o]bjects that are merely 'moved' . . . do not necessarily serve as a 'means of transportation'" is true, but irrelevant. The question, in all cases, is whether a structure capable of being moved over water has the physical ability to carry persons or things.

The term "used" further demonstrates that Congress intended § 3 to sweep broadly. This Court has recognized that the term "use" is "'elastic,'" *Watson v. United States*, 552 U.S. 74, 79 n.7 (2007) (quoting *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting)), and that one of its "standard definitions" is "to 'apply to one's own purposes,'" *id.* (quoting *Random House Unabridged Dictionary* 2097). A person can "use" a watercraft, therefore, for purposes other than those for which it was intended. Just as a "boy who trades an apple to get a granola bar is sensibly said to use the apple," *id.* at 79, a person who tows his belongings on a houseboat is sensibly said to "use" the houseboat for transportation. In neither case – bartering the apple or towing the houseboat – does the object's predominant purpose foreclose it from being "used" for other aims.

3. Other statutes eliminate any doubt that § 3 extends beyond watercraft intended for maritime transportation. Had Congress wanted § 3 to condition vessel status on a watercraft's intended purpose, it would have defined "vessel" to include that requirement. In 18 U.S.C. § 2311, for example, Congress defined "vessel" as "any watercraft or other contrivance used *or designed for* transportation" on water. (Emphasis added). Similarly, in 49 U.S.C. § 13102(25),

Congress defined "vessel" as a "watercraft or other artificial contrivance that is used, is capable of being used, *or is intended to be used*, as a means of transportation by water." (Emphasis added). Congress eschewed any similar reference to a structure's intended purpose in § 3, which is powerful evidence that § 3 contains no such requirement. *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (looking to "[v]arious federal statutes" and noting that, "[w]here Congress intends to refer to ownership in other than the formal sense, it knows how to do so").[14]

B. This Court's Precedents Confirm That § 3 Vessel Status Turns On A Watercraft's Physical Capability

1. In *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), this Court confirmed that vessel status under § 3 turns on a structure's capability. *Id.* at 495. *Stewart* concerned a dredge, the *Super Scoop*, which had "only limited means of self-propulsion" and could "move[] long distances" only by "tugboat." *Id.* at 484. Its predominant function was "remov[ing] silt from the ocean floor," and it moved no more than

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[14] Espousing the same principle, petitioner cites (at 19) 18 U.S.C. § 1081, which defines "vessel" to include any "contrivance used or capable of being used as a means of transportation on water . . . as well as . . . any structure capable of floating on the water." Congress's addition of "structure[s] capable of floating" to the § 3 definition embodies the common-sense recognition that not all structures capable of *floating* are capable of *movement* (and thus transportation). *See Stewart*, 543 U.S. at 494 (noting that vessels that have been "rendered practically incapable of transportation or movement" are not "vessels" under § 3). Vessel status under § 3, of course, requires that a watercraft be capable of both floating and movement. Thus, floating but practically immobile structures, such as floating bridges, are vessels under § 1081 but not under § 3.

"30-to-50 feet" "once every couple of hours." *Id.* at 484, 485.

Seizing on those facts, the dredge's owner argued that "[t]he Super Scoop d[id] not transport passengers or cargo" but was instead a "floating, anchored work platform." Resp. Br. 7, *Stewart*, *supra* (U.S. filed Aug. 2, 2004) (No. 03-814), 2004 WL 1743936. The dredge owner further asserted that admiralty jurisdiction depends on the "'purpose for which the craft [was] constructed and the business in which it [was] engaged.'" *Id.* at 11 (quoting *Perry v. Haines (The Robert W. Parsons)*, 191 U.S. 17, 30 (1903)) (alterations in original). For the dredge owner, "a float's business and purpose are important considerations" in determining vessel status, and the *Super Scoop*'s purpose was dredging, not transportation. *Id.* at 6-7.

The *Stewart* Court unanimously rejected the dredge owner's argument. The Court first observed that § 3's text "sweeps broadly." 543 U.S. at 494. Section 3's plain language "requires *only* that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel." *Id.* at 495 (emphasis added). The Court therefore rejected the First Circuit's test, which had turned on whether a structure's "primary purpose" was "navigation or commerce." *Id.* (citing *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc)).

Although the Court noted that "dredges serve[] a waterborne transportation function, since in performing their work they carried machinery, equipment, and crew over water," *id.* at 492, the *Super Scoop*'s status as a vessel did not depend on that fact. The Court discussed the *Super Scoop*'s "function" to re-

inforce its conclusion about the dredge's capability: "not only [was it] 'capable of being used' to transport equipment and workers over water – it *was* used to transport those things." *Id.* at 495. The *Super Scoop*'s actual "use[]," in other words, provided powerful *evidence* of its capability. That holding does not imply that, contrary to § 3's plain language, vessel status requires that a craft actually be used for maritime transportation.

2. *Stewart* declined to say that a structure is "capable" of maritime transportation simply because its movement over water hypothetically might be imaginable. Rather, *Stewart* established practicality as the touchstone of vessel status; the question "in all cases" is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." 543 U.S. at 496. That holding rested on the Court's recognition that a watercraft "rendered practically incapable of transportation or movement" is "not 'capable of being used' for maritime transport in any meaningful sense." *Id.* at 494.

Stewart found support for its reasoning in *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), and *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926). In *Cope*, the Court considered the status of a dry-dock, which had been "permanently moored by means of large chains" and "was sparred off from the bank." 119 U.S. at 627. The Court concluded that the dry-dock was not a vessel because it "could not be practically used" for maritime transportation. *Id.* In so concluding, the Court compared the dry-dock to other "fixed structure[s]," such as ferry-bridges and floating meeting-houses, that typically lack any practical capacity

for movement over water. *Id.* The Court observed that those structures, like the dry-dock before it, were generally immobilized by some substantial (and difficult to remove) physical restraint. *Id.*[15] When a watercraft is "permanently moored or attached to a wharf" in such a manner, it is not a vessel. *Id.* at 630.[16]

Evansville relied on similar reasoning in finding that an overhauled wharfboat was not a vessel. The wharfboat was moved during the winter "to protect it from ice." 271 U.S. at 20-21. But, once it returned to Evansville each spring, it was "secured to the shore by four or five cables," "connected with the city water system" and power grid, and attached to telephone lines. *Id.* at 21. Each end of the wharfboat was further attached to the land by means of a "driveway," *id.*, from which trucks entered and exited to load and unload cargo from ships. Because these substantial physical attachments combined to immobilize the wharfboat, it was not, the Court concluded, "practically capable of being used as a means of transporta-

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[15] Specifically, the dry-dock was "permanently moored by means of large chains," while ferry-bridges are typically "hinged or chained to a wharf" and floating meeting-houses are generally "kept in place by a paling of surrounding piles." *Cope*, 119 U.S. at 627.

[16] *Cope*'s references to the dry-dock's putative "purpose" do not indicate that the Court's holding depended on that purpose. *Cf.* Pet. Br. 26. On the contrary, *Cope* described the dry-dock's "purpose" only to explain why the dry-dock in fact lacked the practical ability to move over water. *See* 119 U.S. at 627 ("It was not designed for navigation, and could not be practically used therefor."). No other reading comports with *Stewart*, which authoritatively interpreted *Cope* as holding that the dry-dock was not a vessel "because [it was] not *practically* capable of being used to transport people, freight, or cargo from place to place." 543 U.S. at 493.

tion." *Id.* at 22. Unlike petitioner's houseboat, it truly had become an "extension of land."

Stewart recognized that *Cope* and *Evansville* turned on the fact that, in each case, the structure's moorings had defeated any practical mobility. Indeed, *Stewart* explained that the dry-dock in *Cope* and the wharfboat in *Evansville* lacked vessel status for one simple reason – neither was "*practically* capable of being used to transport people, freight, or cargo from place to place." 543 U.S. at 493. As such, *Cope* and *Evansville* "did no more than" enforce the "distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor." *Id.* at 493-94. And a craft is "permanently affixed to shore," according to *Stewart*, when its moorings deprive it of "'mobility and [the] capacity to navigate.'" *Id.* (quoting *The Alabama*, 19 F. 544, 546 (S.D. Ala. 1884)) (brackets in *Stewart*). So interpreted, *Cope* and *Evansville* simply confirm how to apply § 3's plain language in real-world contexts: a watercraft's capability – its "mobility" and "capacity to navigate" – determines whether it is a vessel.[17]

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[17] Petitioner's reliance on *Roper v. United States*, 368 U.S. 20 (1961), which did not even mention § 3, is misplaced. *Roper* addressed whether a "mothballed" liberty ship was unseaworthy when a worker suffered injuries on board. *Id.* at 20-21. He could recover for unseaworthiness only if the vessel was "in navigation." *See id.* at 23-24. Emphasizing that it could reverse only for "clear error," *id.* at 23, the Court "[could not] say as a matter of law" that the ship was a "vessel in navigation," *id.* The Court had no occasion to decide whether the mothballed ship was a § 3 "vessel."

This case is different both procedurally and factually: it does not involve clear-error review, a "mothballed" ship, or "in

II. INTERPRETING § 3 AS CONFERRING VESSEL STATUS ON WATERCRAFT WITH THE PRACTICAL ABILITY TO CARRY PEOPLE OR THINGS OVER WATER AFFORDS A CLEAR AND SIMPLE STANDARD

A. A Bright-Line Rule For § 3 Is Preferable, Especially For Jurisdictional Rulings

The sole question here is whether the district court had subject-matter jurisdiction over respondent's *in rem* action against petitioner's houseboat. *See infra* p. 56 & n.28. In a jurisdictional inquiry, this Court should adopt an interpretation of § 3 that is "as simple as possible." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1185-86 (2010). Simple and clear jurisdictional rules forestall "litigation over whether the case is in the right court" – litigation that is "essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (internal quotations omitted). They also "promote greater predictability," which benefits plaintiffs and defendants alike. *Hertz*, 130 S. Ct. at 1193.

These benefits obtain fully in the admiralty context. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), this Court rejected a proposed rule limiting admiralty tort jurisdiction to cases in which the "totality of the circumstances reflects" a "federal interest in protecting maritime commerce sufficiently weighty to justify" the application of maritime law. *Id.* at 543 (internal quotations omitted). The Court did so for a "most powerful" reason: the petitioner's proposed "multifactor test" would "be hard to apply, jettisoning

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navigation" status. In any event, *Stewart* construed *Roper* as demonstrating simply that vessel status turns on the "practical possibility" of maritime transportation. 543 U.S. at 496.

relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Id.* at 547. A predictable rule that could be "understood reasonably well" was much better. *Id.* For in the admiralty context, as elsewhere, a jurisdictional "boundary" that is "vague and obscure" risks consuming an "enormous amount of expensive legal ability" that would "be much better spent upon elucidating the merits of cases." *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (internal quotations omitted).

The need for a clear "vessel" definition is also acute for maritime liens. Congress's intent in enacting the 1910 FMLA "was to simplify and clarify the rules as to maritime liens as to which there had been much confusion." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 271-72 (1940). The rules governing maritime liens must be clear because a "material-man['s]" willingness to supply necessaries to a watercraft depends on the availability of "reasonably certain criterion" for assessing his legal rights. *Id.* at 280. Definitional complexity deprives repairmen and marina owners of such certainty and "thwart[s] the purpose" of the Act. *Id.*

B. A Practical-Capability Test Is Easy To Apply

A practical-capability test, as the Government notes (at 13), carries "the virtue of relative simplicity." Under that test, a court need only determine whether a floating structure is practically capable of carrying people or things over water. Such a determination will in most cases present no great difficulty, as most structures that are "afloat," can carry cargo or persons, and have the capacity to be "towed

across the [water]" will qualify as vessels. *Board of Comm'rs v. M/V Belle of Orleans*, 535 F.3d 1299, 1307 (11th Cir. 2008). The question, most often, is simply whether some physical impediment has rendered such a floating structure "'practically incapable of transportation or movement.'" *Id.* at 1311 (quoting *Stewart*, 543 U.S. at 494).

Petitioner mistakenly asserts (at 21) that the Eleventh Circuit's test bestows vessel status on any floating object. "Driftwood," for example, is not an "artificial contrivance" and so would not qualify. Neither would most "floating bridges," *id.*, which are typically "fixed and immovable." *E.g.*, *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 216 (1867). Moreover, it is unlikely that "doors removed from their hinges," Pet. Br. 21, could bear the weight of a person or cargo without sinking. Nor would their movement over water be practical. And, even if a door could meet those objective challenges, no one is likely to invoke a federal court's *in rem* jurisdiction over a door. Maritime jurisdiction should not rise or fall on imaginative hypotheticals bearing no relation to the real world.

In any event, the remote possibility that in a future case some exotic structure might attain "vessel" status under the practical-capability test is no reason to reject it. As this Court recently emphasized, "[a]ccepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration." *Hertz*, 130 S. Ct. at 1194. Just as a "nerve center" test of corporate domicile is simpler than any multi-factor alternative, so too is the practical-capability test "relatively easier to apply" than petitioner's amorphous balancing test with its embedded subjective factors. *Id.* This

Court should not forgo the benefits of administrative simplicity merely because isolated "anomalies" might arise. *Id.*

C. Petitioner's "Purposive" Test Is Complicated And Unworkable

The disparate approaches offered by petitioner in his various briefs afford nothing resembling a clear jurisdictional rule. He states (at 16) that "only structures whose purpose is transportation" are vessels. But petitioner provides no clear test for divining a watercraft's "purpose." His failure to do so is telling; a jurisdictional rule turning on a vessel's "purpose" would prove unworkable.

1. Petitioner's Disjointed Formulations Of A "Purposive" Test Are Muddled And Confused

At no stage in the proceedings has petitioner articulated a clear and consistent approach to vessel status. Before the Eleventh Circuit, petitioner accepted that vessel status turns on a craft's practical capability. *See* Pet'r C.A. Br. 15-16 (calling *Stewart*'s "most important criterion" "whether the watercraft's use 'as a means of transportation on water' is a practical possibility") (emphasis omitted). When seeking certiorari, however, petitioner for the first time expressly articulated a "purpose-based test" under which structures are not vessels if "their owners have no design whatsoever to use them" for maritime transportation. Pet. 26. At that point, petitioner framed the Eleventh Circuit's essential error as its failure to consider "whether [a watercraft's] owner intends it to be used for maritime transportation." Pet. 9; *see also* Cert. Reply Br. 6 ("That is petitioner's legal argument here – that his structure was not

a vessel because it was not intended to be used for maritime transportation.").

In his merits brief, petitioner changed his position yet again. Now, according to petitioner (at 22 n.8), the "concept of purpose [is] an objective one" that "disregards an actor's *subjective* intent." His current theory (at 16) is that his houseboat was a non-vessel because it was "indefinitely moored" and "functionally [an] extension[] of land." He offers no clear test for determining whether a structure is "indefinitely moored" and no explanation for the source or content of the shibboleth, "extension of land."

Petitioner's discordant theories – and his repeated failure to articulate clearly what he means by a structure's "purpose" – underscore the fatal flaw in his approach. Tying a structure's vessel status to factors beyond its practical capability results in needless complexity and confusion.

2. Vessel Status Should Not Depend On The Intent Of Its Owner Or Designer

The first possible approach proffered by petitioner is that a vessel's "purpose" turns on whether it is in fact "used to move people or goods over water." Pet. Br. 15. As an empirical matter, the houseboat's actual use renders it a vessel under this test, because petitioner towed the houseboat (and all its interior contents) over water on multiple occasions. Petitioner nonetheless suggests that his houseboat was not actually "used" in this fashion because he *intended* it to serve as a stationary residence. *See id.* at 6 ("petitioner planned to live in Riviera Beach indefinitely"); *id.* at 9 ("purpose" of houseboat was "to serve as a stationary residence").

That suggestion, however, contradicts petitioner's purported disavowal (at 22 n.8) of any reliance on an

owner's subjective intent. This Court should reject any test that includes an element of owner intent, for "[m]otives are difficult to evaluate" and frustrate the principle that "jurisdictional rules should be clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002). The *Lapides* Court's warning applies here; allowing the unverifiable intent of a watercraft's owner to determine vessel status would foment unpredictability and invite gamesmanship. *See* U.S. Br. 26 (noting that such a test is "subject to manipulation"). It would also, as the Government observes (at 25-26), permit a structure to "move in and out of" admiralty jurisdiction with the momentary whims of its owner. *Stewart*, 543 U.S. at 494; *see Sea Village Marina*, 2010 AMC at 419 (noting that a watercraft owner's "mere plans and expectations" are "always subject to change"). Petitioner cites no authority suggesting that admiralty jurisdiction can turn on something so ephemeral.

Petitioner's second suggestion fares no better. He asserts (at 15) that his houseboat lacked the requisite purpose because it was "not designed . . . to move people or goods over water." Again, that standard makes vessel status turn on subjective intent, in this case of someone significantly removed from the litigation. Determining the actual purpose for which a watercraft was originally "designed" will likely prove even more "difficult to evaluate" than determining the intent of its current owner. *Lapides*, 535 U.S. at 621. Indeed, courts "are rarely presented with direct evidence of the subjective purpose motivating the designer or builder of a floating structure." *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 832 n.25 (5th Cir. 1984). And that is true here: petitioner offered no evidence below of the houseboat designer's intent.

Given that evidence bearing on the intent of a structure's builder will be only rarely available, this Court should not require a marina invoking *in rem* jurisdiction to establish such intent.[18]

3. The Government's "Objective Purpose" Test Contains An Unworkable Criterion

The Government correctly repudiates any reliance on an owner's subjective intent, but its proffered standard also raises difficulties and lacks any grounding in § 3's text. It insists (at 25) that a structure's purpose appears from "objective criteria" like its "physical attributes" and "history of use." But the Government, like petitioner, offers no clear method of actually discerning a structure's purpose from those imprecise criteria, which are nowhere found in § 3.

The only determinate factors that the Government identifies (at 28-29) bear largely on a craft's practical capability, not its purpose. The Coast Guard has articulated a "non-exclusive" list of unweighted factors that characterize non-vessels, including whether a craft: (1) is "surrounded by a cofferdam, land or other structure" depriving it of "practical access to navigable water"; (2) is "affixed to the shore by steel cables, I-beams or pilings, or coupled with land based utility connections for power, water, sewage and fuel"; (3) would be "endangered because of its construction" if "operated in navigation"; (4) possesses a "purpose, function, or mission" suggestive of perma-

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[18] Although a structure's construction with "land-based building materials" might indicate something about its purpose, *cf.* Pet. Br. 3, the construction "materials" should be relevant to vessel status only insofar as they affect its practical capability for maritime transportation. Petitioner's houseboat demonstrably had the capability of being used for maritime transportation.

nent mooring; and (5) cannot "get underway in less than eight (8) hours." Craft Routinely Operated Dockside, 74 Fed. Reg. 21,814, 21,815 (May 11, 2009) ("Coast Guard Policy"). The Government offers no guidance for courts in evaluating those factors when some, but not all, are met.

In this case, four of the factors – whether a cofferdam forecloses access to navigable water, whether moorings deprive a craft of mobility, whether its construction makes waterborne transportation infeasible, and whether it can readily get underway – are objectively verifiable and speak directly to the houseboat's practical capacity for maritime transportation. All four cut against petitioner. *See infra* p. 52. This Court can thus affirm the Eleventh Circuit's practical-capability test while accepting the relevance of those four factors.

But the remaining factor – a craft's "purpose, function, or mission" – sinks the Government's test.[19] The Government articulates no coherent standard for divining a craft's "function" or "mission." To the extent that those elastic terms invite consideration of facts apart from a craft's practical capability for transportation, they would only spawn confusion and invite courts to invent factors not found in the statutory text. The Fifth Circuit, for example, struggled before *Stewart* to articulate a test for divining a craft's objective purpose, and it produced only a jumbled multi-factor test.[20] The Government offers

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[19] Significantly, no federal agency – including the Coast Guard – signed onto the Government's brief here. In that respect, this case differs from *Stewart*.

[20] *See, e.g., Holmes v. Atlantic Sounding Co.*, 437 F.3d 441, 446 (5th Cir. 2006) (listing 10 factors that the Fifth Circuit had

little hope that its preferred approach – likewise requiring courts to balance a hodgepodge of factors in search of a craft's amorphous "purpose" – would be any clearer. Such a vague and malleable multi-factor test cannot be squared with this Court's command that jurisdictional rules "remain as simple as possible." *Hertz*, 130 S. Ct. at 1186.[21]

III. PETITIONER'S ARGUMENTS FOR DEPARTING FROM § 3's PLAIN LANGUAGE ARE UNPERSUASIVE

A. The General Maritime Law Does Not Override § 3's Text

Petitioner argues (at 22) that this Court should adopt a "purposive approach" to vessel status because the general maritime law assertedly employed such an approach. Petitioner's argument contravenes this Court's settled approach to interpreting statutes and misunderstands the general maritime law.

1. Section 3 unambiguously says that a watercraft's capability determines whether it is a vessel. Accordingly, courts should assess whether a structure is "capable" of maritime transport – if it is,

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considered before *Stewart* "[t]o evaluate the purpose for which a craft is constructed").

[21] The Government suggests (at 22) that other "maritime-law questions often depend upon a particular vessel's purpose or function." The occasional relevance of a watercraft's purpose to the merits of a dispute, however, does not mean that purpose should determine admiralty jurisdiction. Jurisdiction demands simplicity in a way that substantive law does not; in fact, jurisdictional rules should be simple precisely so that litigants can focus on "elucidating the merits of cases." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring in the judgment) (internal quotations omitted); *accord Grubart*, 513 U.S. at 549 (Thomas, J., concurring in the judgment).

the "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotations omitted). Indeed, this Court has held it inappropriate to rely on the common law when doing so would conflict with clear statutory language. *See Neder v. United States*, 527 U.S. 1, 24-25 (1999) (refusing to incorporate the "common-law requirements of 'justifiable reliance' and 'damages'" into mail-fraud statute because those elements were "incompatible" with the statute's "language").

2. Petitioner's interpretation of *Stewart* is misguided. *Stewart* stated that "Section 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law." 543 U.S. at 490. Petitioner interprets this statement to give courts carte blanche to bypass the statutory text and piece together the meaning of the word "vessel" from nineteenth-century court opinions. *See* Pet. Br. 23 (citing historical "lower court decisions" that supposedly "applied the purposive approach").

Stewart authorized nothing of the sort. The Court referenced the general maritime law, but only to illuminate – not upend – the statutory text. *See* 543 U.S. at 493 (rejecting argument that previous decisions "ha[d] implicitly narrowed § 3's definition"). It cited early cases, such as *The Alabama*, that had recognized dredges (like the *Super Scoop*) as having "'the capacity to be navigated in and upon the waters.'" *Id.* at 491 (quoting *The Alabama*, 19 F. at 546). As such, the Court readily concluded that the *Super Scoop*, too, was a vessel under § 3. But the Court left no doubt that its conclusion rested not on some freewheeling survey of old cases, but on Congress's clear textual instruction that "Section 3 requires only that a watercraft be 'used, or capable of

being used, as a means of transportation on water.'" *Id.* at 495.

3. The unsettled nature of the general maritime law further undermines petitioner's interpretive theory because no single approach to vessel status was universally accepted when Congress enacted § 3. Petitioner selectively cites certain maritime cases to support a sweeping over-generalization (at 24) that "general maritime courts treated as vessels only craft whose *purpose* . . . was to move people or things over water." But in fact the courts took differing approaches to vessel status.

Many early cases held that vessel status turned primarily on a structure's capacity for waterborne movement. In 1884, a federal court considering a maritime lien asserted against a dredge and a scow "distinctly recognize[d] mobility and capacity to navigate as a prime element" of vessel status. *The Alabama*, 19 F. at 546. During that era, the "reasons the courts . . . held [dredges] to be subject to admiralty jurisdiction" were that dredges were "used or capable of being used as means of transportation." *The International*, 83 F. 840, 841 (E.D. Pa. 1897) (internal quotations omitted), *aff'd*, 89 F. 484 (3d Cir. 1898).

Similarly, courts routinely bestowed vessel status on crafts that had non-transportation purposes. Judge Benedict, for example, had "no doubt as to the jurisdiction of the court . . . to enforce a claim for towage against a house boat." *Rogers v. A Scow Without A Name*, 80 F. 736, 736 (E.D.N.Y. 1897); *see also The Ark*, 17 F.2d 446, 447 (S.D. Fla. 1926) (enforcing maritime lien against moored "house boat" used as a "residence" and "floating supper club"). This Court, too, upheld admiralty jurisdiction over a

car float whose "deck [was] relaid to make a dancing floor" and intended "to be used for amusement purposes." *The Jack-O-Lantern*, 258 U.S. 96, 98 (1922) (internal quotations omitted). Even when the owners had no "present intention to use [it] for transportation purposes," an "amusement vessel[]" was nevertheless a "vessel" because it "could be towed . . . anywhere that a barge can be taken." *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930).

Although some admiralty courts prior to enactment of § 3 attempted to divine a watercraft's purpose, *see* Pet. Br. 23-24 & n.9, petitioner offers no evidence that their decisions reflected a consensus so dominant as to justify a presumption that Congress silently imported their views into § 3. Indeed, a fairer way to characterize the state of the general maritime law on this issue is that courts held divergent views of vessel status. Accordingly, petitioner cannot meet his high burden of establishing that Congress meant to include a "purpose" requirement in § 3.

In sum, the absence of any consensus among admiralty courts on the correct approach to determining vessel status fatally undermines petitioner's theory that Congress imported general maritime law wholesale into § 3. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) (Congress cannot be said to incorporate courts' usage unless "all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss") (internal quotations omitted).

Of course, general maritime law cases are not always so discordant. On some questions – such as whether dredges are vessels – maritime courts reached a general consensus. *See Stewart*, 543 U.S. at 490-92. Similarly, courts have overwhelmingly

agreed that "floating homes" like petitioner's are vessels. *See Sea Village Marina*, 2010 AMC at 413-14 (collecting cases). In such cases, § 3 "should be construed consistently with the general maritime law." *Stewart*, 543 U.S. at 492. But because general maritime courts disagreed on whether purpose determines vessel status, this Court should presume that Congress meant what it said: that the word "vessel" encompasses any structure "capable of being used" for maritime transportation.

4. This Court's opinion in *Parsons* is not to the contrary. In *Parsons*, the Court considered whether general maritime law preempted a state statute conferring jurisdiction to enforce a lien for necessaries furnished to a vessel. The Court had no occasion to discuss § 3's relevance to a maritime lien, because the case pre-dated the FMLA. In holding the state statute preempted by maritime law, the Court remarked that the "question of jurisdiction . . . regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. at 30. Understood in its proper context, that statement poses no conflict with § 3's text.

The issue in *Parsons* was whether admiralty jurisdiction reached a small horse-drawn canal boat. *See id.* at 30-31. In answering affirmatively, the Court rejected the defendant's argument that the boat's small size – and the fact that it was drawn by horses – exempted it from admiralty jurisdiction. *See id.* *Parsons*'s comment about a structure's "purpose" should therefore be read in light of the clause that immediately preceded it: that "neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction." *Id.* at 30. The Court thus held that a watercraft actually

intended for maritime transportation – notwithstanding an esoteric size or shape – is *included* within the admiralty jurisdiction. That holding accords with § 3: a craft whose purpose is waterborne transportation will typically be "practically capable" of such transportation. But it does not follow – and *Parsons* did not hold – that a structure otherwise capable of being used for maritime transportation can be *excluded* from vessel status based on its perceived "purpose."

Parsons cannot bear petitioner's more aggressive interpretation. The opinion nowhere mentioned § 3, and, as *Stewart* made clear a century later, the text of § 3 controls whether a watercraft qualifies as a vessel. *See* 543 U.S. at 490-91. Not once in the intervening hundred years did this Court quote *Parsons*' statement about the "purpose for which the craft was constructed." And, despite the *Stewart* respondent's emphatic reliance on the case, *Stewart* did not cite it at all. Accordingly, *Parsons* provides no support for denying vessel status under § 3 to a watercraft practically capable of maritime transportation.

B. Petitioner's Policy Arguments Are Unpersuasive

Petitioner advances various policy considerations (at 35-47) for confining vessel status to those crafts intended for maritime transportation.[22] But those

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[22] Petitioner's policy arguments are more properly addressed to Congress, as this Court has admonished. An admiralty court's primary task is not to speculate about the policy ramifications of a statute, but rather to "keep strictly within the limits imposed by Congress." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). When Congress has legislated, "an admiralty court should look primarily to [Congress's] enactments for

arguments compound the jurisdictional complexity and uncertainty that his approach would produce. To "decide in each case," as petitioner urges, whether federal or state jurisdiction "would make a better fit with the particular circumstances" of a dispute would "make the determination of jurisdiction hopelessly uncertain." *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012, 1015 (7th Cir. 2006) (Posner, J.). That is "not a price worth paying," even if petitioner's approach might in some future case produce a "slightly better match of law to fact." *Id.*

Even if the Court were to consider petitioner's policy arguments, they have no merit. This Court has long emphasized that admiralty jurisdiction's "broad scope" extends well beyond disputes "concerning a peril occurring on the high seas or within the ebb and flow of the tide." *Simmons v. The Steamship Jefferson*, 215 U.S. 130, 139 (1909). *See, e.g., Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004) (recognizing admiralty jurisdiction over a cargo claim arising out of a train wreck in northern Alabama). Excluding from admiralty jurisdiction watercraft that are practically capable of waterborne transportation would contravene this principle and frustrate important federal policies.

1. Petitioner erroneously argues (at 35-36) that his purposive approach to vessel status comports with the goals of the FMLA. Congress enacted the 1910 FMLA "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries." *Piedmont &*

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policy guidance." *Id.* As with most statutes, the "best evidence" of the policy that Congress sought to advance in enacting § 3 is the "statutory text." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 11 (1920). Its purpose was to create a "significant, clear, and predictable security device" that would provide ships the "ability to offer something of value in exchange for what it needed." *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 870-71 (11th Cir. 2010). In doing so, Congress also insured those servicing vessels against the risk that ship owners might "sail their vessels away after services are rendered." *Id.* at 870.

Recognizing petitioner's houseboat as a vessel advances these purposes. His houseboat occupied a slip in "one of the most desirable" areas of the Marina (JA33), and respondent provided the houseboat with valuable dockage services (JA34). Those services are "necessaries" under the FMLA. *See* 1 SCHOENBAUM § 9-3, at 703. Moreover, respondent expressly noted its entitlement to a maritime lien when it offered petitioner dockage services. JA15 (Wet-Slip Agreement stating that "the Marina . . . has a maritime lien").

Refusing to recognize a maritime lien in these circumstances would upset respondent's expectations and discourage the provision of similar dockage services in the future. *Cf. Crimson Yachts*, 603 F.3d at 871 (emphasizing need for maritime liens to be "clear[] and predictable"). It also would invite owners of all sorts of assertedly "indefinitely moored" watercrafts to move "away after services are rendered." *Id.* at 870. That possibility existed here, because petitioner had already relocated his houseboat from marina to marina (JA71-72, 77-78), and no coffer dam, concrete footings, or heavy chains kept petitioner's houseboat affixed to its location at the Marina (JA33). Thus, when petitioner owed money

for the dockage services he received, a maritime lien was entirely appropriate.

2. Petitioner speculates (at 38) that applying substantive maritime tort doctrines to stationary structures would have "perverse" consequences. Petitioner's Question Presented, however, addresses only whether his houseboat was a "vessel" for jurisdictional purposes. Pet. i. Thus, this Court need not address the substantive maritime tort doctrines that petitioner invokes. *See Grubart*, 513 U.S. at 546 (rejecting proposal that it "synchronize the jurisdictional enquiry with the test for determining the applicable substantive law"). In any event, it is a "fundamental feature of admiralty law[] that federal admiralty courts sometimes do apply state law." *Id.*; *see also, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-16 (1996) (recognizing admiralty jurisdiction but holding that state substantive law applied).

Petitioner's arguments are better saved for an admiralty court deciding which doctrine to apply in a given dispute. No matter how "[i]ncongruous" petitioner may find those doctrines, his policy arguments cannot justify "gerrymandering our admiralty jurisdiction in an effort to avoid the statute's plain import." *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1267 (9th Cir. 1993) (Kozinski, J., dissenting).[23]

3. Petitioner's arguments about the Jones Act fail for similar reasons. *See* Pet. Br. 39-41. The mere fact that a watercraft is a "vessel" does not transform everyone on board into a "seaman" for Jones Act pur-

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[23] In *Grubart*, this Court vindicated Judge Kozinski's dissent, which the Ninth Circuit recognized by abrogating *Delta Country* in *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005).

poses. A seaman "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Thus, a court faced with a Jones Act claim must "weigh[]" the "total circumstances of an individual's employment" to "determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Id.* at 370 (internal quotations omitted). A proper application of that test may well exclude petitioner's imagined waiter, nanny, or blackjack dealer. *See* Pet. Br. 40. Regardless, courts should resolve those issues as they arise – on factual records actually presenting the question of Jones Act status. *See Stewart*, 543 U.S. at 494 (emphasizing that "other prerequisites to qualifying for seaman status under the Jones Act provide some limits, notwithstanding § 3's breadth"). There is no reason to gerrymander admiralty jurisdiction in the meantime.

4. Petitioner suggests (at 41-43) that treating his houseboat as a "vessel" would subject it to ill-fitting Coast Guard regulations. However, petitioner cites many provisions – such as those requiring "'an adequate supply of potable water'" – that do not apply to vessels like houseboats. *Id.* at 41-42 (quoting 46 U.S.C. § 3305(a)(1)(D)); *see* 46 U.S.C. § 3305(a)(1) (limiting application to "vessel[s] subject to inspection"); 46 C.F.R. § 24.05-1 table (row (3)) (criteria absent here required for non-self-propelled craft to be subject to inspection). To the extent other regulations might apply to vessels like petitioner's houseboat (*but cf.* Am. Gaming Ass'n *Amicus* Br. 11 n.8 ("AGA Br.") (doubting that regulation would be affected by vessel status)), the Department of Homeland Security is free to exercise its expert judgment

and exempt any craft for which it believes regulation would be unnecessary. *See, e.g.*, 46 U.S.C. § 4302(c)(1) (directing Secretary, in prescribing regulations for recreational vessels, to "consider the need for and the extent to which the regulations will contribute to recreational vessel safety"); Coast Guard Policy, 74 Fed. Reg. at 21,815 (cancelling "[e]xisting policy documents . . . until they can be conformed to the Stewart decision").

5. Petitioner's federalism arguments are likewise unfounded. Admiralty jurisdiction "extends at least" to all "activities traditionally undertaken by vessels, commercial or noncommercial," and mooring a watercraft "at a marina on a navigable waterway is a common, if not indispensable, maritime activity." *Sisson*, 497 U.S. at 367. Indeed, a docked watercraft like petitioner's houseboat implicates several traditional maritime interests. It could, for example, break free of its moorings and collide with vessels or other structures in a marina. *See, e.g.*, *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922-23 (11th Cir. 2001) ("casino vessel" under construction "broke free from her moorings" and "struck and damaged a grain-loading conveyor facility").

Here, petitioner's houseboat posed a recognized threat to other vessels in the Marina. JA32-33 (inspector noting that houseboat risked slipping its moorings). Not only would a collision with another structure have dampened commercial activity throughout the Marina, but it could have required significant "salvage and wreck removal" for which the houseboat was not insured. JA33. Addressing such risks demands the predictable and uniform legal regime that admiralty supplies. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982) ("The

federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity."). This strong federal interest in ensuring legal uniformity for those that use navigable waterways – including marinas – outweighs competing local interests. *See id.* at 674 (rejecting argument that "'federalism' concerns dictate" the application of state law to non-commercial vessels).

Petitioner's invocation (at 45-47) of Florida's homestead laws does not alter this conclusion. Respondent was entirely justified in instituting the present *in rem* action. Petitioner owed money for dockage services provided by the Marina, and his houseboat was trespassing at the Marina. JA22-24, 28-29, 34-35. The FMLA and federal maritime law were designed to provide a federal remedy for such situations, notwithstanding possible state-law defenses. *Cf. Piedmont*, 254 U.S. at 12 (stressing that FMLA was intended to supersede "conflicting state statutes") (internal quotations omitted). In any case, the federal remedy here did not conflict with Florida law. Even if petitioner's houseboat at some point qualified for a Florida homestead exemption, that "exemption was extinguished" once petitioner trespassed on the Marina. *Meadow Groves Mgmt., Inc. v. McKnight*, 689 So. 2d 315, 316 (Fla. Dist. Ct. App. 1997) (affirming denial of homestead exemption for mobile home whose owner failed to pay rent).

IV. PETITIONER'S HOUSEBOAT WAS A "VESSEL"

A. Petitioner's Houseboat Was Practically "Capable" Of Carrying People And Goods Over Water

The Eleventh Circuit correctly interpreted § 3 and concluded that petitioner's houseboat was "capable" of conveying things over water. The court "echoed" *Stewart* and held that vessel status turns on "'whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.'" App. 13a (quoting *Stewart*, 543 U.S. at 496). As such, its "primary inquiry" focused on whether petitioner's houseboat was "'rendered practically incapable of transportation or movement.'" *Id.* (quoting *Belle of Orleans*, 535 F.3d at 1312, quoting in turn *Stewart*, 543 U.S. at 494).

Applying the *Stewart* test, the Eleventh Circuit found that the record demonstrated unequivocally that petitioner's houseboat was capable of water-borne transport. It observed that the houseboat "*was* towed several times over considerable distances" and that the "record dispute[d]" petitioner's unsupported contention that it lacked the ability to make a similar voyage again. App. 17a-18a. The court likewise noted that not a "shred of evidence" supported petitioner's assertion that his houseboat had sustained damage during its previous voyages. App. 18a. In short, the "record [was] clear" that petitioner's houseboat retained the "practical capacity" for water-borne movement. App. 19a.

This Court should affirm the Eleventh Circuit's judgment. Petitioner does not deny that his houseboat had the physical ability to carry things over water; he acknowledges installing towing "cleats" on

his houseboat so as to permit exactly that. Pet. Br. 4; JA86-87. He also admits that he successfully towed his houseboat on multiple occasions. Pet. Br. 4-5; JA83-84. Petitioner testified that, on one occasion, he moved the houseboat approximately sixty nautical miles simply by "borrow[ing] a friend's speed boat" and "pull[ing]" it. Lozman Dep. 12:1-14:4. As the Eleventh Circuit correctly held, this "evidence of the actual voyages made by [petitioner's houseboat] under tow" conclusively established its practical capacity for maritime transportation. App. 18a.

B. Petitioner's Assertions Lack Merit

Petitioner does not genuinely dispute that his houseboat had the practical capability of being used for maritime transportation. Instead, he mostly recites facts – such as what his houseboat "looked like," Pet. Br. 3; his on-board "living quarters," *id.*; and his purported "plan[] to live in Riviera Beach indefinitely," *id.* at 6 – that are wholly irrelevant to vessel status. And the few relevant assertions that he does make cannot support a remand, because they are "contradicted by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

1. Petitioner maintains (at 4) that his houseboat incurred "damage" during its maritime voyages and that moving it was "difficult." Neither fact, even if true, would demonstrate that the houseboat lacked the practical capacity for waterborne transportation. After all, any logistical challenges that petitioner may have faced did not prevent him from moving the houseboat over water on multiple occasions. And a watercraft that sustains some incidental damage after repeatedly moving over water is a far cry from the sort of structures that courts have held practically incapable of maritime transport. *Cf. Kathriner*

v. UNISEA, Inc., 975 F.2d 657, 660 (9th Cir. 1992) (denying vessel status to craft that had "large opening . . . cut into her hull" such that, "[w]hen she put out to sea, she would surely sink").[24]

In any event, the record refutes petitioner's assertion (at 4) that his houseboat "sustained serious damage" while moving. In support of that proposition, petitioner now cites only the Eleventh Circuit's opinion, *see* Pet. Br. 4-5 (citing App. 18a), which rejected his assertion as unsupported by even a "shred of evidence." App. 18a. Moreover, after the U.S. marshals conducted their own tow of petitioner's houseboat, a surveyor found "no observations to indicate recent damage." JA39. Apart from speculation in a stricken district court brief,[25] petitioner can point to nothing suggesting that his houseboat incurred any damage at all – much less damage eliminating its practical capacity for movement over water.

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[24] If a watercraft lost its status as a vessel because it was unseaworthy, seamen on poorly maintained vessels would lose the protections afforded them under the general maritime law and the Jones Act, an irony Congress could not have intended.

[25] *Cf.* Pet. Br. 5 n.6 (citing Claimant's Surreply 5-6). The district court properly struck that brief for failing to comply with the Local Rules, *see supra* note 5, and this Court should not now rely on it. Nor did that brief contain actual evidence. Petitioner merely speculated that he "could take photographic evidence" of the purported damage and "provide it to the Court." Claimant's Surreply 6. A party's allusion to hypothetical evidence in a legal brief is not itself evidence, and it cannot defeat a motion for summary judgment. *See Scott*, 550 U.S. at 380 (requiring a party to "do more than simply show that there is some metaphysical doubt as to the material facts") (internal quotations omitted).

2. In his merits brief, petitioner for the first time describes his watercraft as "indefinitely moored." *E.g.*, Pet. Br. 2, 11-12, 16. That description is inaccurate. Petitioner tied his houseboat to the dock using ropes that were "deteriorated" and "not sufficient to prevent the craft from breaking loose." JA32. Apart from those rotting ropes, only a single 50-amp extension cord and a small hose connected the houseboat to the shore. JA33, 41; Trial Transcript 28:4-9 (Nov. 23, 2009). An inspector recommended that "[a]ll dock lines should be removed and replaced with new [lines] of adequate size and scope to properly secure the craft." JA32.

Those insubstantial attachments to the shore belie petitioner's description of his houseboat as "indefinitely moored." *Stewart* made clear that a vessel is "permanently" or "indefinitely" moored only when its use for transportation no longer remains a "practical possibility." 543 U.S. at 496. Structures whose moorings preclude practical maritime transportation include a dry-dock secured by "large chains" and "sparred off from the bank," *Cope*, 119 U.S. at 627; a wharfboat secured by "four or five cables," telephone lines, semi-permanent electrical and water connections, and driveways, *Evansville*, 271 U.S. at 21-22; and a barge "moored to shore by lines tied to sunken steel pylons that were filled with concrete," "connected to the pier by steel ramps," "joined to a shore-side building," and "connected permanently" by "numerous shore-side utility lines – telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer." *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995).

Petitioner's houseboat was nothing like those crafts.[26] To free his houseboat from its so-called "indefinite" moorings, petitioner needed only to untie or cut the four dilapidated ropes, unplug the extension cord, and unscrew the hose. A craft that can be put to sea with such minimal effort is not "indefinitely moored."

The Coast Guard's criteria for assessing whether a craft is "permanently moored" – embraced by both petitioner (at 42) and the Government (at 28) – reinforce that conclusion. Four of those factors (*see supra* pp. 34-35) indicate that petitioner's houseboat was not permanently moored: no physical structure foreclosed its access to water; its weak moorings did not even resemble "steel cables," let alone "I-beams or pilings"; its previous maritime journeys did not "endanger[]" it; and "get[ting it] underway" took only minutes, not eight hours. Because these facts establish the houseboat's practical capability for transportation, petitioner's asserted purpose for the craft was irrelevant.

3. The overwhelming evidence of the houseboat's practical capacity for maritime transportation obviates any need for a remand. "Every court to have considered the question has found floating homes [comparable to petitioner's] to be vessels." *Sea Village Marina*, 2010 AMC at 413 (collecting cases). Petitioner and the Government offer no persuasive reason why this case should be any different.

The Government asserts (at 30-31) that there is "little evidence" about the "purpose or function of petitioner's floating home; about its design; or about

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[26] Petitioner's houseboat was also nothing like a "boat[] in a moat," AGA Br. 2, or the permanently moored post-*Stewart* casino boats that have been held to be non-vessels, *id.* at 9-12.

how suitable the structure was for . . . transporting people, freight, or cargo." But, as the Eleventh Circuit properly concluded, such factors are "relevant only to the extent that [a craft's] design prevents it from having any practical capacity for transportation over water." App. 19a. The Government fails to identify any concrete facts that petitioner might adduce on remand to create a genuine dispute over this question.[27] Whatever (unspecified) facts petitioner might adduce on remand, they could not refute what the record definitively establishes: that his houseboat was practically capable of – and was actually used for – maritime transportation. A remand in such circumstances would "serve no purpose." *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 728, 738 (1982) (declining to remand wrongful-discharge action because plaintiff "will not now be able to adduce evidence, which he has heretofore declined to present," that he had necessary employment contract).

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[27] The Government notes (at 30) that the houseboat lacked "motive power or steering" and that "there was some evidence that it could be towed only with great care, at very low speeds, in relatively calm waters." But vessel status has never required effective self-propulsion, *see Stewart*, 543 U.S. at 484 (noting that the *Super Scoop* had "only limited means of self-propulsion" and could "move[] long distances" only by "tugboat"); nor has it required navigation at high speeds or in turbulent waters, *see Norton v. Warner Co.*, 321 U.S. 565, 567 (1944) (holding that a barge was a vessel, even though it had "no motive power of its own" and "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia").

C. This Court Should Affirm Even If It Considers Factors Other Than The Houseboat's Practical Capability

1. Alternatively, this Court can affirm because waterborne transportation was important to the purpose of petitioner's houseboat. That purpose should be judged based solely on objective criteria. *See supra* pp. 32-33 (explaining that admiralty jurisdiction cannot turn on subjective intent). Petitioner's houseboat was objectively intended to provide "a water-borne place to live with the added advantage of at least some maritime mobility." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968). That mobility proved valuable to petitioner, permitting him on multiple occasions to relocate his home in response to changing circumstances. JA71-72, 77-78.

The houseboat's physical characteristics also refute petitioner's assertion that it was intended to remain stationary. Petitioner's houseboat bore little resemblance to the "floating homes" that, according to petitioner's *amici*, lack a transportation purpose. *Cf.* Seattle Floating Homes Ass'n *et al. Amicus* Br. 12-17 ("SFHA Br."). Unlike typical floating homes, petitioner's houseboat had "cleats" to facilitate towing. *Compare id.* at 16 *with* JA86-87. It also lacked the semi-permanent (and difficult to remove) utility connections typical of floating homes. *Compare* SFHA Br. 20 (floating home's "electrical connection generally must be detached by an electrician"; floating home may require "a diver to detach the home's sewage hookup") *with* JA33 (showing houseboat's 50-amp extension cord); Cert. Opp. 7-8 (houseboat lacked sewage connection). And, in contrast to most floating homes, petitioner's houseboat was docked

in a municipal marina filled with commercial and recreational vessels. *Compare* SFHA Br. 7 (floating homes "typically located" in "the aquatic equivalent of a suburban subdivision") *with* Legue Aff. ¶¶ 6-10 (Marina services primarily recreational and commercial vessels).

The objective indicia of petitioner's state of mind demonstrate that he well understood these differences between his houseboat and a stationary "floating home." The bill of sale documenting petitioner's purchase of his watercraft designated it a "Homemade Custom Houseboat/Barge." JA79; *see Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) ("[c]ases referring to houseboats have uniformly held that a houseboat is a vessel"). The Wet-Slip Agreement also classified petitioner's watercraft as a "Houseboat" (JA13), and it repeatedly described the houseboat as a "vessel" or "boat" (JA13-20). That Agreement further required petitioner to "relinquish [his] berth when requested by the City" (JA13), and it permitted respondent, on three days' notice, to terminate entirely petitioner's right to dock in the Marina (JA17). Petitioner agreed that, upon receipt of such notice, he would "remove the vessel from the City's premises." *Id.* These circumstances do not even remotely "evidence a permanent location." *Evansville*, 271 U.S. at 22.

For similar reasons, petitioner's houseboat – notwithstanding his conclusory assertions to the contrary – did not "function[] as an extension of land." *E.g.*, Pet. Br. 2, 16. Petitioner lacked any property interest in the Marina's land, and the Wet-Slip Agreement required him to "remove" the houseboat from the Marina on a mere three days' notice. JA17. Petitioner was not even entitled to remain in

a particular slip. The Agreement gave respondent unfettered discretion to relocate the houseboat to another slip at any time without advance notice. JA14. A structure cannot be an "extension" of land to which it is so tenuously connected.

Moreover, unlike in *Evansville*, petitioner's houseboat performed a function that could not "have been performed as well by an appropriate structure on the land." 271 U.S. at 22. The *Evansville* wharfboat served as an "office, warehouse, and wharf" that merely "stor[ed]" goods and "transferr[ed]" them to adjacent steamships – functions that a land-based structure could have fully replicated. *Id.* at 21-22. By contrast, the capacity for waterborne movement was pivotal to the function of petitioner's houseboat; had petitioner lived in a land-based home, for instance, he could not have relocated so easily. JA73-74, 78.

2. Respondent's burden to establish a prima facie case for subject-matter jurisdiction fortifies the conclusion that this Court should affirm even under petitioner's legal theory. Petitioner's Question Presented asks this Court to review only the Eleventh Circuit's judgment that the district court had admiralty jurisdiction over respondent's claims. Pet. i.[28] Because this case turns solely on a jurisdictional issue, the question is whether respondent made a "nonfrivolous assertion of jurisdictional elements."

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[28] Even if the Question Presented (notwithstanding its express focus on "federal maritime jurisdiction") could be read broadly to include merits issues turning on the "vessel" definition, broader issues were not preserved for this Court's review. The only vessel-status issue raised in the Eleventh Circuit was petitioner's challenge to the exercise of admiralty subject-matter jurisdiction. *See* Pet'r C.A. Br. 12-26. The only non-jurisdictional challenge to the maritime lien was factual. *See id.* at 27-31.

Grubart, 513 U.S. at 537. Moreover, because those jurisdictional elements overlapped with the merits of respondent's claim to a maritime lien, respondent's burden in demonstrating jurisdiction required only that it satisfy a "prima facie standard." *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 978 & n.12 (2006) (collecting cases adopting the prima facie standard). That standard requires "less than a preponderance showing," *id.* at 989, and it applies throughout the entire litigation – including at summary judgment, at trial, and on appeal, *id.* at 996.

Accordingly, this Court is confronted with the question whether respondent made a "prima facie" showing that petitioner's houseboat was a vessel. Under any theory of vessel status, respondent has satisfied that minimal burden.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 12, 2012

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-80594-CIV-DIMITROULEAS

CITY OF RIVIERA BEACH,
Plaintiff,

v.

THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL, APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, HER ENGINES, TACKLE, APPAREL, FURNITURE, AND ALL OTHER NECESSARIES APPERTAINING AND BELONGING IN REM,
Defendant.

[Filed Sept. 11, 2009]

ORDER

THIS CAUSE is before the Court on Claimant's July 27, 2009 Motion to Dismiss [DE-64]. The Court has considered Claimant's July 27, 2009 Memorandum [DE-65], Plaintiff's August 13, 2009 Response [DE-68] and Claimant's August 21, 2009 Reply [DE-81] and finds as follows:

On April 20, 2009, Plaintiff succeeded in convincing this Court to arrest the vessel pursuant to a valid maritime lien. Claimant contends that this Court has no jurisdiction over this case, as the seized structure is not a vessel or a houseboat, but a floating residential structure, not subject to federal maritime law. Whether a floating residential structure is subject to federal maritime law need not be decided at

this time, as there is a factual dispute as to what the seized structure is.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v. Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)). To survive a motion to dismiss, the plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.v. Twombly*, 127 S. Ct. 1955, 1960 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1968. Taking Plaintiff's allegations to be true, the instant Complaint is sufficient to withstand Defendant's motion to dismiss.

Wherefore, Claimant's Motion to Dismiss [DE-64] is Denied. The request for attorneys fees is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of September, 2009.

/s/ WILLIAM P. DIMITROULEAS
WILLIAM P. DIMITROULEAS
United States District Judge

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REPLY BRIEF

No. 11-626

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is common ground between the parties – and has long been the law – that a structure is a "vessel" if it is "practically capable of maritime transportation." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 (2005); *see also Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) ("practically capable"); Petr. Br. 27-28, 31; Resp. Br. 16. The City thus does not distinguish itself from petitioner, or advance the ball in terms of the question presented, insofar as it propounds a "practical capability" rule for vessel status. This case turns on *how to assess* such "practical capabil[ity]."

Petitioner asks this Court to adhere to the test it announced over a century ago and that it has applied in practice for nearly one hundred and fifty years: a floating structure is practically capable of maritime transportation if "*the purpose* for which the craft was constructed, and the business in which it is engaged" is moving people or things over water. *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added); *see also* Petr. Br. 12-14, 25-30 (discussing other cases). The City, on the other hand, contends (like the Eleventh Circuit) that this Court's decision in *Stewart sub silentio* "rejected" the longstanding purposive test. Resp. Br. 24; *see also* Pet. App. 16a, 19a. Even though there was no need in *Stewart* to coin a new test for vessel status, the City argues that *Stewart* expanded the definition of the word "vessel" to cover the "broader" category of most anything that floats and that is not securely moored to shore with some unspecified degree of firmness. Resp. Br. 20.

This Court should turn aside the City's request to dramatically expand maritime jurisdiction. The

purposive test has been followed not only by this Court, but also by lower courts and espoused by maritime treatises, for over a century. It is fully consistent with *Stewart*. And it has long produced consistent and sensible results. Respondent's new formula, by contrast, contravenes well-settled principles of statutory interpretation, finds no support in precedent, and would open the door to artificial manipulations of maritime coverage.

Applying the purposive test to the facts here makes clear that the district court erred in assuming jurisdiction and granting summary judgment for the City. The purpose of petitioner's floating home was to serve as a stationary residence that functioned as an extension of land. Neither the fact that it had been towed and repositioned a few times over the years nor that it was secured by ropes instead of chains altered that purpose or otherwise rendered the indefinitely moored home a vessel.

ARGUMENT

I. This Court Should Reaffirm That The Purposive Test Controls Whether A Floating Structure Is Practically Capable Of Maritime Transportation.

This case provides no reason for this Court to change the basic test for determining "practical capability" of maritime transport. The purposive test this Court adopted over a century ago is firmly grounded in law and has worked well. The City's alternative test – which covers most anything that floats and then exempts items moored to shore to some unspecified degree – lacks legal pedigree and would raise serious administrability concerns.

A. The Purposive Test Is Well-Grounded In Law And Has Worked For Over A Century.

The City contends that the purposive approach contradicts the text of 1 U.S.C. § 3, misreads precedent, and is unworkable. None of these criticisms has merit.

1. The purposive test comports with the text of Section 3. As petitioner has explained, the word "capable" often connotes an object's suitability or fitness for performing a certain function. Petr. Br. 20. Such is the case here. The word "capable" in Section 3 asks whether one of an object's purposes is moving people or things over water.

Contrary to the City's suggestion (Resp. Br. 19), this definition gives the "capability" prong of Section 3 independent meaning from the "use" prong. If a busy lawyer in a coastal area purchases a sailboat intending to use it for weekend excursions but never has time to set sail, the sailboat is still a vessel, even though it is continuously moored at the local marina and is never used for maritime transportation. *See, e.g.*, *The Scorpio*, 181 F.2d 356, 358-59 (5th Cir. 1950). The "capable of" prong of Section 3, in short, ensures that watercraft designed to move people or things over water do not pass in and out of maritime jurisdiction depending on a "snapshot" of whether they are actually in use at any particular time. *See Stewart*, 543 U.S. at 494-95.[1]

---

[1] Neither of the other statutes the City cites is helpful in construing Section 3. *See* Resp. Br. 22-23. The definitional section of the criminal code, 18 U.S.C. § 2311, uses the phrase

2. Any uncertainty generated by the text of Section 3 standing alone is quickly dispelled by the precedent and tradition dictating that a structure's purpose determines whether it is practically capable of moving people or things over water. Indeed, petitioner is at a loss to understand the City's suggestion (Resp. Br. 40-41) that this Court has never adopted the purposive test.

As noted at the outset of this brief, this Court explained in 1903 that the question of vessel status "regards only [whether] *the purpose* for which the craft was constructed, and the business in which it is engaged" is moving people or things over water. *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added). Every decision before or since has applied that test and has excluded from vessel status those structures whose purpose is not moving people or things over water. *See Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887) (repeatedly stating that the "purpose" of a structure determines vessel status and concluding that a dry-dock was not a vessel because it was "not used for the purpose" of maritime transportation); *Evansville & Bowling Green Packet*

"designed for" where Section 3 uses the term "capable of," but gives no hint that Congress intended the two phrases to be anything other than interchangeable. The definition in 49 U.S.C. § 13102(25) includes the phrase "or is intended to be used" on top of the language in Section 3. That language encompasses objects whose purpose is not maritime transportation but whose owners nonetheless use them for that purpose – the very category of objects the City claims is already encompassed in the phrase "capable of" and thus would be superfluous if the City's construction of "capable of" were correct.

Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21-22 (1926) (holding that a wharfboat that was towed numerous times was not "practically capable" of maritime transport because its "function" was "storage and handling" of items, "not . . . to carry freight from one place to another"); *Roper v. United States*, 368 U.S. 20, 21-23 (1961) (floating warehouse that was repeatedly towed was not a vessel because it was "withdrawn from navigation"; "its function [was] storing grain until needed" and "was not moved in order to transport commodities from one location to another").[2] Federal courts of appeals and authors of maritime treatises likewise have long taken the purposive test as settled law.[3]

---

[2] The City suggests that this Court's decision in *The Jack-O-Lantern*, 258 U.S. 96 (1922), "bestowed vessel status on [a] craft[] that had [a] non-transportation purpose[]." Resp. Br. 38. But the craft there was "a steamer" with a working "engine and boilers," and "propeller[s]." *Jack-O-Lantern*, 258 U.S. at 98-99. It is hardly surprising, therefore, that no one disputed it was a vessel.

[3] *See* Pet. Br. 22, 25-26 (quoting test from Benedict's 1870 treatise and modern treatises that tracks *Perry*'s test practically verbatim); *see also, e.g.*, *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) ("To be a vessel, the purpose and business must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters.") (internal quotation marks omitted); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2nd Cir. 1996) ("[T]he important factor" in determining vessel status "is the purpose for which the structure is presently being used – e.g., transportation, construction, etc."); *Hercules Co. v. The Brigadier General Absolom Baird*, 214 F.2d 66, 69 (3rd Cir. 1954) ("[T]he purpose and business of the craft or use for which she is intended . . . are the factors which determine whether there is admiralty jurisdiction."); *Great Lakes Dredge & Dock*

Furthermore, even the City acknowledges that general maritime courts around the time Section 3 was enacted employed the purposive test. Resp. Br. 38; *see also* Petr. Br. 22-24. The City, of course, also asserts that a few cases followed a different path. Resp. Br. at 38-39 (citing *Rogers v. A Scow Without a Name*, 80 F. 736 (E.D.N.Y. 1897); *The Ark*, 17 F.2d 446 (S.D. Fla. 1926); and *The Showboat*, 47 F.2d 286 (D. Mass. 1930)). But none of those cases deviated from the purposive test.

The structure at issue in *Rogers* was seemingly an ordinary "house boat," which was so obviously a vessel – and so obviously different than a "floating home" – that the court spent only one sentence on the issue. 80 F. at 736; *see also* Petr. Br. 2 (distinguishing "houseboats" from "floating homes"); *infra* at 16-17 (same). Indeed, the same judge held in another case that a floating home nearly identical to petitioner's was not a vessel because it was not "employed in the transportation of freight or passengers from place to place upon water." *Woodruff v. One Covered Scow*, 30 F. 269, 270 (E.D.N.Y. 1887).[4] The "amusement vessel[]" in *The*

Co. v. City of Chicago, 3 F.3d 225, 229 (7th Cir. 1993) ("[A] craft is a 'vessel' if its purpose is to some reasonable degree the transportation of passengers, cargo, or equipment from place to place across navigable waters.") (internal quotation marks omitted), *aff'd sub nom., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

[4] The "Judge Benedict" who the City notes (Resp. Br. 38) authored *Rogers* and *Woodruff* was a different person than Erastus Cornelius Benedict, who wrote the leading treatise of the time on admiralty law. *See* http://www.fjc.gov/servlet/nGetInfo?jid=154&cid=999&ctype=na&instate=na.

Showboat was "a five-masted schooner" with "a crew consisting of a licensed master or mate and two or three seaman." 47 F.2d at 287. Noting that this ship remained a vessel even when its owners lacked any "*present* intention" to sail, *id.* (emphasis added), the court rejected a "snapshot" test, not the purposive test. Indeed, the court accepted and distinguished another case holding that a similar structure was *not* a vessel because it "was not used, *or intended to be used*, to carry freight or passengers from one place to another." *Hayford v. Doussony*, 32 F.2d 605 (5th Cir. 1929) (emphasis added), *cited in Showboat*, 47 F.2d at 287. Finally, the court in *The Ark* held that the "boat" at issue there, which was being used at the time as a "floating supper club and dance hall," was a vessel because it had been only "*temporarily* withdrawn from commerce." 17 F.2d at 447-48 (emphasis added). Once again, this decision simply rejected a "snapshot" argument, not the purposive test.

That leaves the City's reliance on *Stewart*. According to the City, *Stewart sub silentio* "rejected" *Perry*'s purposive test. Resp. Br. 24. But *Stewart* did nothing of the sort. It reaffirmed this Court's prior cases that employed the purposive test and its "withdrawn from navigation" corollary. *See* 543 U.S. at 493-94, 496. The *Stewart* Court also stressed that the statutory term "vessel" should continue to be construed "in light of the term's established meaning in general maritime law," *id.* at 492, and it used the phrase "capable of" interchangeably with "function," *id.* at 495. *Stewart* thus reinforced that while Section 3 "does not require that a watercraft be used *primarily* for th[e] purpose" of transportation on water, a structure must have a "function" of carrying

people or things over water in order to be a vessel. 543 U.S. at 492, 495 (emphasis in original).

3. Finally, the City attacks the administrability of the purposive test on three grounds. None is persuasive.

First, the City claims to be "confused" concerning exactly what approach to "practical capability" petitioner advocates and suggests that courts would share its confusion. Resp. Br. 31. Let petitioner be clear: his position is that this Court should continue to employ the purposive test articulated in *Perry* and applied in all of this Court's other cases. *See also* Petr. Br. 12, 25-26. Maritime treatises and lower courts have followed this test for almost one hundred and fifty years, *see id.*, and it has never before generated trouble.

Second, the City contends that the purposive test is problematic insofar as it depends on "an owner's subjective intent." Resp. Br. 32-33. But the purposive test does not turn on any such intent. To the contrary, petitioner and the Government agree that the purposive test turns on an objective assessment of a structure's function. Petr. Br. 22 n.8; Gvt. Br. 24. The City's objection thus has no bearing on this case.[5]

---

[5] The objective nature of the purposive test also disposes of the vast majority of the concerns of amici that have filed briefs on the City's side of the case, which are all premised on an aversion to a subjective inquiry for vessel status. *See* Br. of United Bhd. of Carpenters and Joiners of Am. at 3; Br. of Mar. Law Ass'n at 11-14; Br. of Thirty-Six Admiralty and Mar. Law Professors at 15-24; Br. of Marine Bankers Ass'n at 9-19. The Maritime Law Association's related suggestion (at 21-24) that

Third, the City asserts that a rule turning on a structure's objective purpose is difficult to apply. Resp. Br. 34-36. The short answer is that the past century-plus of applying the purposive test demonstrates otherwise. At any rate, tests dependent on objective purposes abound across numerous areas of the law. *See, e.g.*, *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011) (Confrontation Clause's application turns on objective purpose of police interrogation); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) ("[t]he eyes that look to purpose" to determine the legality of a law respecting religion "belong to an objective observer") (internal quotation marks omitted); *Warren v. Fairfax Cnty.*, 196 F.3d 186, 191 (4th Cir. 1999) (test for public forum under First Amendment depends on the forum's objective purpose); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 950 (7th Cir. 2004) (Clean Water Act's application depends on objective purpose of discharges); *Nickerson v. C.I.R.*, 700 F.2d 402, 404 (7th Cir. 1983) (objective purpose determines whether taxpayer's enterprise was profit or pleasure). Such tests are effective because they generate predictable outcomes based on the innate natures of things.

---

commercial lenders could be prejudiced if certain "dead ships" with ship mortgages are treated as non-vessels substantially underestimates the prudence of commercial lenders. For such loans, lenders ordinarily require borrowers to grant a ship mortgage *and* a real estate mortgage, *as well as* a UCC security interest (in case the property is deemed neither real estate nor a vessel, but merely personal property).

The City offers no persuasive reason why a purpose-based test is uniquely ill-suited to maritime jurisdictional inquiries. For the most part, floating structures either have a function of conveying people or things over water or they are intended to sit still (save perhaps incidental relocations). It is not hard to say which is which. Indeed, as the United States explains, numerous maritime doctrines themselves depend on assessing a vessel's purpose or function. Gvt. Br. 22-23.

B. The City's Proposed Method For Assessing Vessel Status Lacks Legal Foundation And Would Be Unduly Manipulable.

Like the Eleventh Circuit (*see* Pet. App. 16a, 19a), the City contends that purpose has nothing to do with vessel status. Advancing the broadest possible definition of the word "capable," the City emphasizes that "many objects are 'capable' of being used for purposes other than those for which they [a]re intended," and asks this Court to confer vessel status on objects based purely on what their "physical attributes" would allow to occur. Resp. Br. 20-21.

Yet faced with this Court's repeated holdings that structures that were towed across water were not vessels, the City does not defend the Eleventh Circuit's rule that anything that floats and can be towed across water is a vessel, Pet. App. 18a, 21a. Instead, the City contends that "*most* structures that are afloat" and "have the capacity to be towed across the water will qualify as vessels." Resp. Br. 29-30 (emphasis added) (internal quotation marks, alterations, and citation omitted). The City then offers the two qualifications implicit in its word

"most": (1) objects that "can[not] carry cargo or persons" are not vessels and (2) objects that are "immobilized by some substantial (and difficult to remove) physical restraint" are not vessels. *Id.* at 26, 29.

The City's more complicated alternative to the purpose test fares no better than the Eleventh Circuit's. The first purported restriction is really no restriction at all. And the second presents numerous legal and practical problems.

1. It is true that a structure must be able to convey people or things over water to be a vessel. But making merely that "physical" ability a prerequisite for vessel status, *id.* at 20-21, instead of requiring the structure to have a *purpose* of transporting things, does not meaningfully limit the category of covered objects. Virtually anything that floats and has either a somewhat flat surface or a cavity of some kind can carry people or things across water while under tow. For example, modular dock pieces, *see* http://www.ez-dock.com/en.html; water trampolines and play structures, *see* http://www.ravesports.com/proline.html; and floating commercial fishing nets and cages (gill nets, for instance, *see* http://en.wikipedia.org/wiki/Gill_net), all have the physical attributes necessary to carry people or things over water under tow. Yet none of these things are, as Section 3 requires, "commonly thought of as being capable of being used for water transport." *Stewart*, 533 U.S. at 494. Indeed, it is telling the City does not point to any floating object that cannot carry people or things over water.

2. The City's second proposed qualification to vessel status – the "substantial physical restraint" exception – is even more vexing.

As an initial matter, this test has no basis in law. Section 3 asks whether a structure is "capable of" maritime transportation. If, as the City says, all the phrase "capable of" means is having "physical attributes that allow it to carry things over water," Resp. Br. 21, then the origin of the City's mooring exception is unclear. The mere fact that a floating object is firmly secured to land does not deprive *the object* of any physical attribute that would allow it to carry things over water. Nor does it make maritime transportation impractical, in the sense of being difficult to accomplish. Instead, a connection to land simply requires someone to exert a certain amount of effort to unlatch the structure before using it to transport something.

Nor does the City's physical restraint exception comport with precedent. The structures this Court deemed non-vessels in *Cope* and *Evansville* were fastened to shore by chains or cables. But the same cannot be said of the "mobile warehouse" in *Roper*, 368 U.S. at 23, or the floating fish processing plant in *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 659 (9th Cir. 1992), which was merely "anchored and tied to a dock." Yet this Court in *Stewart* confirmed that the latter two structures were non-vessels as surely as the former two were. 543 U.S. at 494, 496. Scows that general maritime courts deemed non-vessels likewise were sometimes simply "attached to the wharf by lines." *Woodruff*, 30 F. at 269; *see also Ruddiman v. A Scow Platform*, 38 F. 158, 158 (S.D.N.Y. 1889) (scow "designed to be moored along-

side a wharf" was not a vessel "because it was not designed or used for the purpose of navigation"). Equally important, *none* of these decisions turned on the precise characteristics of the attachments to shore; while judicial opinions sometimes included descriptions of the attachments as relevant evidence of a structure's function, the driving *legal test* in each case was the structure's purpose. *See supra* 4-6 Petr. Br. 22-31.

No other test makes sense. There is no way to pinpoint exactly how firmly secured a structure must be to render it a non-vessel. Must it be affixed with new ropes instead of "deteriorated" (Resp. Br. i) ones? Chains or cables instead of ropes? A particular number of chains? What if a structure is securely fastened to land with steel beams but can be easily detached from them if necessary "to tow [the structure] to sheltered waters in the event potentially damaging weather is forecast"? *See Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995). The potential questions go on and on.

Even if this Court were willing to create out of whole cloth a precise test for what constitutes a "substantial physical restraint," the test would be utterly manipulable. If all that separated petitioner's floating home from the structures at issue in *Cope* and *Evansville* were four or five chains, then everyone in petitioner's position in the future could simply use chains instead of ropes to fasten their structures to piers. Worse yet, owners of sailboats or yachts who used them sparingly could presumably moor them with chains or cables instead of nylon lines and thereby evade maritime jurisdiction entirely. In short, if any rule has the potential to

undermine stability in maritime law and wreak havoc on things such as preferred ship mortgages (*see* Br. of Nat'l Marine Bankers Ass'n), it is the City's proposal.

Lastly, the City's proposed test for vessel status would extend maritime law into disputes in which there is no need for federal jurisdiction – and in which maritime law's special rules designed to "compensat[e] or offset[] the special hazards and disadvantages" of navigation at sea, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991), do not sensibly apply. To repeat just one example: the City's test would confer "seaman" status on waiters on floating restaurants, blackjack dealers in floating casinos, and nannies on floating homes. Petr. Br. 40. A "seaman" is anyone who has a "substantial" connection to a vessel and who "contributes to the vessel's function or mission." *Stewart*, 543 U.S. at 494-95. As OSHA has explained and court decisions confirm, such waiters, blackjack dealers, and nannies most certainly would satisfy these requirements, *see* Petr. Br. 40 (citing authority), and the City does not seriously contend otherwise, *see* Resp. Br. 45.[6] Instead, the City simply says "this Court need not address the substantive maritime tort doctrines that petitioner invokes." *Id.* at 44.

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[6] Also noteworthy is the United States' warning that "adopting the Eleventh Circuit's test on a nationwide basis would significantly increase the number of large passenger 'vessels' that the Coast Guard would be required to inspect, diverting time and resources away from structures that are far more relevant to maritime safety and security." Gvt. Br. 29 n.11.

This will not do. It is perfectly understandable for a litigant – as well as the Maritime Law Association and some maritime professors – to want to broaden the scope of admiralty jurisdiction and expand the reach of maritime law's generous remedies. But one cannot ignore the potential consequences of such a request or deride them as mere "policy arguments." *Id.* at 42. It is a fundamental canon of construction that when this Court construes a statutory term – especially, as here, a term in a definitional provision – it must consider "'not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Such is the essence of structural analysis. That the City endeavors to steer this Court away from contemplating whether its rule fits with the rest of maritime law is compelling reason, in and of itself, to reject its proposal.

II. The Purposive Test Dictates That Petitioner's Floating Home Was Not A Vessel.

Even though the City itself initially pursued relief against petitioner "under state landlord-tenant law" in state court, Pet. App. 30a – turning to federal law only after losing at trial and subsequently being enjoined for engaging improper self-help tactics (Dft. Tr. Exh. 4) – the City now contends that petitioner's floating home was so clearly a vessel that it was entitled to summary judgment on that jurisdictional issue. Applying the purposive test to the record here, however, shows that the Eleventh Circuit's decision should be reversed because petitioner's home was not

a vessel. At the very least, this case should be remanded so that the lower courts can apply the proper legal test and take any extra evidence that is necessary to do so. *See* Gvt. Br. 29-31.[7]

Without denying that "floating homes" are non-vessels, the City urges this Court to lump petitioner's home in with the "houseboats" that various lower courts have held are vessels. Resp. Br. at 54-55 (citing *Miami River Boat Yard, Inc. v. 60' Houseboat Serial #SC-40-2860-3-62*, 390 F.2d 596 (5th Cir. 1968); *Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979)). But unlike houseboats, which have a "purpose" of moving

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[7] The City now suggests for the first time in this litigation (and on the last page of its brief) that it need only have "made a 'prima facie' showing that petitioner's [home] was a vessel." Resp. Br. 57. Because the City made no such argument in its Brief in Opposition, this Court should consider it waived. *See* Sup. Ct. R. 15.2. At any rate, the City's suggestion is frivolous. A plaintiff may need to make only a prima facie showing on a jurisdictional issue when the issue first arises in district court proceedings, or on appeal after a district court has dismissed the case. But when, as here, a district court postponed any jurisdictional determination until the submission of evidence and then assumed jurisdiction and entered judgment for the plaintiff, Pet. App. 40a-42a, an appellate court must decide whether the plaintiff properly established jurisdiction by a preponderance of the evidence. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Data Disc, Inc. v. Sys. Techn. Assocs., Inc.*, 557 F.2d 1280, 1285 n.2 (9th Cir. 1977) ("Of course, at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of the evidence."); *see also Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675-78 (1st Cir. 1992) (same in context of jurisdictional facts that go to merits).

people and their things over water, *Miami Boat Yard*, 390 F.2d at 597, the objective facts indicate that petitioner's home lacked any such purpose. Petitioner's home was constructed with plywood to specifications governing land-based dwellings. Petr. Br. 3. It may not have been as architecturally impressive or meticulously maintained as upmarket floating homes in places like Seattle and Sausalito. But, just like such structures, petitioner's home was designed to sit still and function as an extension of land, not to carry things over water. *Id.* at 4. Indeed, at the time of its seizure, the home had been sitting still for three years and was indefinitely affixed to the City's marina. *Id.* at 16.

None of the City's quibbles with these inalterable facts indicate any contrary purpose.

• The City emphasizes that petitioner's floating home was secured in its marina pursuant to a "wet-slip agreement" and that "[p]etitioner lacked any property interest in the Marina's land." Resp. Br. 55. But floating homeowners frequently lack any real property interest. *See* Br. of Seattle Floating Homes Ass'n at 7, 25; *Woodruff*, 30 F. at 269 (floating home not a vessel even though it was tied to municipal wharf). And to the extent the terms of the standard moorage agreement petitioner signed shed any light on whether its purpose was maritime transportation, the venue provision, requiring any lawsuit to be governed by "the laws of the State of Florida,"

suggested that federal admiralty law did not apply to his home. J.A. 20.[8]

• The City contends that the home's affixations to land – ropes, a power line, and a water hose – were too "insubstantial" to indicate indefinite mooring. Resp. Br. 51, 54. But it is common for floating homes on saltwater to be attached by rope instead of cables or other metal devices; rope provides greater elasticity in fluctuating tides. Br. of Seattle Floating Home Ass'n at 7-8; *Woodruff*, 30 F. at 269. The critical aspect of petitioner's home's utility connections, therefore, was not how difficult they might have been to remove, but rather – as one state law distinguishing floating homes from houseboats puts it – that they showed that the home was "*dependent* for utilities upon a continuous utility linkage to a source originating on shore." CAL. HEALTH & SAFETY CODE § 18075.55(d) (emphasis added). The nature of petitioner's utilities connections, in other words, underscored, rather than undermined, the non-transportation purpose of his home.

• The City next notes that petitioner's floating home was "relocated" twice over the six years of his ownership – first from the place of purchase to North Bay Village, and then from North Bay Village to the City's marina. Resp. Br. 56, 48-49. But petitioner

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[8] The City incorrectly suggests that after it invoked federal law to trump petitioner's state-court victory, petitioner bid for his home at the U.S. Marshal's auction. Resp. Br. 13. In truth, he never registered to bid. The City outbid the public, foregoing the money it could have obtained at the sale in order to take ownership of the structure and destroy it.

had the structure moved only out of necessity. When he purchased the home, it was affixed to someone else's private property, so he had to move it. And he moved it from North Bay Village only because a hurricane destroyed the facility. Those reasons for moving hardly suggest that petitioner's home had any transportation purpose.[9]

• Finally, the City disputes that petitioner's floating home incurred damage when it was towed. *Id.* at 49. Even if petitioner's home had remained unscathed, this would not suggest petitioner's home was a vessel. There is no indication that the structures at issue in *Evansville*, *Roper*, or *Pavone* incurred any damage whatsoever when towed repeatedly. Yet this Court treated each as non-vessels because they lacked any transportation function. *See Stewart*, 543 U.S. at 493-94, 496. In any event, numerous photos in the record reflect the damage petitioner's home suffered when towed. *See, e.g.*, J.A. 52 (photo 17; bright plywood patch showing where exterior wall failed), 48 (photo 10: white epoxy patch), 44 (photo 1: discolored patches showing

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[9] The City also occasionally references the U.S. Marshal's arrest and tow of the structure after the City has filed its complaint and acted on its purported maritime lien. *E.g.*, Resp. Br. 50. But it is well-established that a plaintiff may not establish subject matter jurisdiction based on facts it manufactures after filing its lawsuit. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986) (a plaintiff cannot "create jurisdiction retroactively where it did not previously exist").

repairs below French doors). And if the district court or Eleventh Circuit had ruled evidence on this particular point relevant, petitioner could have introduced much more. *See* Petr. Br. 5 n.6; Gvt. Br. 30.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 2012

SUPPLEMENTAL BRIEF

No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO COURT'S AUGUST 14, 2012 ORDER

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August 28, 2012

QUESTION PRESENTED

On August 14, 2012, the Court ordered the parties to file letter briefs addressing the following question:

"The *res* in this putative *in rem* admiralty proceeding was sold at a judicial auction in execution of the district court's judgment on a maritime lien and a maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the *res* render this case moot?"

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On August 14, 2012, this Court ordered the parties to brief whether the case is moot. In respondent's view, the case is not moot. When the houseboat was sold at judicial auction, the sale proceeds became the substitute *res*. Although those proceeds were credited against the administrative expenses associated with the houseboat's arrest, respondent had posted a bond for $25,000 that now secures any obligation respondent may have to repay the sale proceeds. Under this Court's well-settled precedent and maritime practice, that bond is sufficient for the continued jurisdiction of the case as an *in rem* action.

STATEMENT

Shortly after petitioner's houseboat was arrested, the district court ordered respondent to "post a $25,000 bond to secure [petitioner's] value in the vessel." JA68. Respondent posted that bond, *see* D.C. Dkt. 46, and it remains in force today.

A substitute custodian took custody of the houseboat following its arrest. *See* D.C. Dkt. 8. The custodian charged more than $11,000 in conjunction with arresting the houseboat and towing it from Riviera Beach to Miami. That included the cost of the towboat and the two employees who rode on the houseboat during the voyage from Riviera Beach to Miami. *See* D.C. Dkt. 151-1 (attached as an Addendum to this brief). In addition, maintaining the houseboat cost approximately $2,800 per month for dockage and insurance. *See id.*

Arguing, *inter alia*, that "the expense of keeping the property [was] excessive or disproportionate," Fed. R. Civ. P. Supp. Rule E(9)(a)(i)(B), respondent moved for an interlocutory sale. *See* D.C. Dkt. 132. The district court denied the motion. *See*

D.C. Dkt. 134. As soon as the district court granted summary judgment, App. 33a-49a; *see* Resp. Br. 12, respondent renewed its motion. *See* D.C. Dkt. 151. The district court granted that motion when it entered final judgment. It also permitted respondent to "credit bid" at the sale. *See* D.C. Dkt. 157; Resp. Br. 13 & n.8.

Respondent, as the successful auction bidder for $4,100,[1] acquired title to the houseboat. The sale proceeds were credited against the amount for which the houseboat was responsible under the district court's judgment, which included the lien amounts and the administrative expenses. Because the administrative expenses, which dwarfed the $4,100 sale proceeds,[2] had priority over the liens, the sale proceeds were allocated entirely to reimbursing respondent for those expenses.

When respondent was unable to resell the houseboat or get a charity to accept it as a donation, the houseboat was destroyed. *See* Resp. Br. 13 & n.9.

ARGUMENT

I. Neither The Sale Of Petitioner's Houseboat Nor Its Subsequent Destruction, Standing Alone, Moots The Present Case

As leading commentators have long recognized, an *in rem* action in admiralty involves specialized rules. *See generally, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 786-805 (2d ed. 1975) ("GILMORE & BLACK") (describing *in rem* actions). In an *in rem* action, the *res* is the defendant in the action. *See, e.g.*, *id.* at 589, 613. In this case, petitioner's houseboat was accordingly the defendant

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[1] Respondent bid $4,100 for the houseboat at the judicial sale because that was the minimum amount necessary to outbid an obvious straw bidder who was acting in concert with petitioner.

[2] When respondent filed its successful Motion for Interlocutory Sale (D.C. Dkt. 151), the substitute custodian had already billed more than $32,000. *See* Addendum. The total administrative expenses, which also included the fee paid to the U.S. marshal for arresting the houseboat, were even higher.

in respondent's action to enforce maritime liens for "necessaries" (here, dockage fees) and maritime trespass.

In maritime practice, the original *res* in an *in rem* action (typically but not necessarily[3] a vessel) is almost always replaced by some other form of security – generally money or the promise to pay money. By statute, a shipowner is unilaterally entitled to recover its vessel by providing the U.S. marshal with a bond for twice the sum claimed by the plaintiff.[4] *See* 28 U.S.C. § 2464(a).[5] More commonly, the shipowner will propose some other form of substitute security and the vessel will be released by agreement of the parties under Supplemental Rule E(5)(a). For many decades, the normal practice has been for the shipowner's insurer to issue a "letter of undertaking" to stand as security in the vessel's stead. *See, e.g., Crescent Towing & Salvage Co. v. Chios Beauty MV*, 610 F.3d 263, 266 (5th Cir. 2010); *see generally, e.g.*, Michael Marks Cohen, *Restoring the Luster to the P & I Letter of Undertaking*, 42 J. Mar. L. & Com. 255, 257-61 (2011). Other common forms of security have included bank guarantees and standby letters of credit. *See id.* at 256-57. In *Continental Grain Co. v. Barge FBL–585*, 364 U.S. 19 (1960), the shipowner issued its own letter of undertaking. *See id.* at 28-29 (Whittaker, J., dissenting) (describing and quoting shipowner's letter of undertaking).

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[3] An *in rem* action also may be brought, for example, against maritime cargo or pending freight. *See, e.g.*, GILMORE & BLACK 622 n.80. It also may be brought against a sunken shipwreck. *See, e.g., California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

[4] In this case, therefore, petitioner could have recovered his houseboat immediately after it was arrested (or at any subsequent time until the sale) if he had simply provided the necessary bond, which would have been for less than $7,000 – a modest sum for a multimillionaire such as petitioner (*see* Lozman Dep. 44:15-23 (D.C. Dkt. 98-1)). *See also* Supp. Rule E(5)(a). He chose not to do so.

[5] The statute still uses the term "libellant," which is the historic admiralty term for the plaintiff. *See, e.g.*, GILMORE & BLACK 35.

The parties almost always agree to the release of the vessel when alternate security is posted because neither has any incentive for the vessel to remain under arrest. The shipowner cannot profitably employ a vessel in the custody of the U.S. marshal (or a substitute custodian). The arrest is also expensive for the plaintiff, who must pay administrative expenses (at least in the first instance). *See, e.g.*, GILMORE & BLACK 796. Indeed, arresting a vessel is sufficiently expensive and complicated for the plaintiff, and sufficiently disruptive for the shipowner, that a shipowner will often arrange for a letter of undertaking to avoid a threatened arrest. *See, e.g., Petroleos Mexicanos Refinacion v. M/T King A*, 554 F.3d 99, 101 (3d Cir. 2009) ("[i]n return for the issuance of the [letter of undertaking], Pemex agreed . . . to refrain from arresting the vessel"). Releasing a vessel when security is posted is so common that the federal rules expressly permit the interlocutory sale of an arrested vessel "if . . . there is an unreasonable delay in securing release of the property." Supp. Rule E(9)(a)(i)(C).

When a vessel is released on the posting of alternate security, that security becomes the substitute *res*. *See, e.g., The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827) (Story, J.) ("the stipulation is deemed a mere substitute for the thing itself"); *Petroleos Mexicanos*, 554 F.3d at 104 ("the letter [of undertaking] becomes a complete substitute for the *res*"); GILMORE & BLACK 799 ("[T]he effect of release is to transfer the lien from the ship to the fund represented by the bond or stipulation. The lien against the ship is discharged for all purposes . . . ."). The vessel proceeds on its voyage, unaffected by anything that happens in the litigation, and the

litigation proceeds on its course, unaffected by anything that happens to the vessel.[6] Once there is a substitute *res*, the original *res* becomes irrelevant except as a matter of historical fact. So long as the original *res* served its purpose *at the time of the arrest* – the invocation of the appropriate jurisdictional and substantive rules on which the *in rem* action rests – it is no longer necessary for the court's jurisdiction. And, so long as there is a substitute *res*, the original *res* no longer provides security.

To the extent relevant here, the judicial sale of the *res* is comparable to the posting of security. The sale proceeds become the new *res* (while the purchaser takes free of all prior claims against the *res*). This Court recognized as much in *Republic National Bank v. United States*, 506 U.S. 80 (1992), when it consistently referred to the sale proceeds in an *in rem* action as the new *res*. *See, e.g., id.* at 82 (referring to "the res, then in the form of cash"), 84 (referring to "the transfer of the res" when it was the sale proceeds that were transferred). If the plaintiff prevails, its claims are paid from the sale proceeds (after administrative expenses have been paid). If the sale proceeds exceed all the claims on the vessel, the excess is returned to the owner. *See, e.g.*, GILMORE & BLACK 37, 791-92.

Republic National Bank also implicitly recognized that a sale of the original *res* does not moot an *in rem* action.[7] In that case, the original *res* was sold while the

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[6] Letters of undertaking recognize that the subsequent destruction of a previously arrested vessel has no impact on the security. Most contain a clause recognizing the insurer's obligation to pay any final judgment (after appeal), "ship lost or not lost." *See, e.g.*, Cohen, 42 J. Mar. L. & Com. at 273 (sample letter of undertaking).

[7] *Republic National Bank* was "an *in rem* civil forfeiture proceeding," 506 U.S. at 81-82, that was required to "'conform as near as may be to proceedings in admiralty,'" *id.* at 84 (quoting 28 U.S.C. § 2461(b)). Moreover, the Court relied (in relevant part) primarily on admiralty precedents. Thus the decision is applicable in this admiralty action.

case was still pending. After final judgment, the sale proceeds were transferred to the Treasury (because the government was the successful plaintiff). Only then did the government claim that the case had become moot and persuade the court of appeals to dismiss the appeal. This Court reversed. It was sufficient that the district court had jurisdiction when the original *res* was arrested. *See* 506 U.S. at 84-89. The case was not moot because the government could still transfer the sale proceeds (or a portion of them) to the claimant (if it succeeded on appeal). *See id.* at 95-96. Even under the government's rejected theory, the sale of the original *res* standing alone would not have mooted the case; the government instead relied on the transfer of the sale proceeds out of the district. *See id.* at 83. This Court's conclusion that the case was not moot after the sale and transfer of the proceeds implicitly (but necessarily) recognized that the sale alone would not moot the case.

The subsequent destruction of the original *res* in an *in rem* action after a judicial sale is irrelevant. When the original *res* is sold, the sale proceeds become the substitute *res*, *see id.* at 82, 84, and the purchaser at the judicial sale acquires a clear title to the original *res*, *see, e.g.*, GILMORE & BLACK 622, 787-88. The purchaser is accordingly free to do anything it wants with its newly acquired property – including destroy it – without adversely affecting the litigation.

As soon as it was arrested, petitioner's houseboat became the *res* in the present action. Petitioner had the unilateral power to provide a substitute *res* if he had chosen to post a modest bond, *see supra* note 4, but he decided not to do so. The houseboat thus continued to be the *res* until the judicial sale. If it had actually been

incapable of being towed over water, and had sunk during the 80-mile voyage from Riviera Beach to Miami, that destruction of the *res* might have mooted the case. Once the U.S. marshal sold the houseboat, however, the sale proceeds became the new *res* and the houseboat was freed of all claims. Its subsequent destruction was accordingly irrelevant. That action did not moot the present controversy.[8]

II. A Judgment In The Present Case Would Not Be "Useless"

As this Court recognized in *Republic National Bank*, an *in rem* case may become moot when "the release of the property would render the judgment 'useless' because 'the thing could neither be delivered to the libellants [*i.e.*, the plaintiffs, *see supra* note 5], nor restored to the claimants.'" 506 U.S. at 85 (quoting *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, C.J.)). The *Republic National Bank* Court continued, still quoting Chief Justice Marshall, to note that such a case would not become moot if "'the judgment will have any effect whatever.'" *Id.* (quoting *The Little Charles*, 26 F. Cas. at 982). In the present action, this Court's judgment will have an effect whichever way the case

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[8] Respondent has consulted with counsel for the maritime *amici* that filed briefs in support of respondent. All agree that the present case is not moot. The Maritime Law Association is particularly concerned with the potential disruption of maritime law and practice that would occur if this Court were to find the present case moot on the basis of either the sale or the subsequent destruction of the vessel. Failing to recognize that money or the promise to pay money can become a substitute *res* would call into question the most fundamental principles governing *in rem* actions. And, if the subsequent destruction of the original *res* were to assume any relevance after a substitute *res* has been provided, the value of any security would become questionable. Plaintiffs would be unwilling to release vessels, thus exposing them to the perils of navigation, unless they can rely on the security of the substitute *res* regardless of what happens to the vessel.

The present system operates on the assumption that arrested vessels will generally be released quickly when their owners provide adequate security. Interfering with that system would disrupt not only maritime law and practice but also maritime commerce itself.

is decided. Although the original *res* has been destroyed, its substitute is still available and is more than adequately secured by respondent's $25,000 bond.

To appreciate the effect of this Court's potential judgment, it is first essential to understand what currently remains at issue on the pending "vessel" status question – particularly because the analysis changed somewhat on appeal. The district court had three distinct options on the "vessel" status question: (1) It could have agreed entirely with petitioner and held that his houseboat was not a "vessel" even under the standard appropriate for establishing jurisdictional facts that overlap with the merits. *See* Resp. Br. 57; Clermont *Amicus* Br. 4-11; Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 978-84, 1006-08 (2006). In that event, the district court would have lacked jurisdiction to decide the merits of the asserted maritime liens. (2) The district court could have held that respondent made a sufficient case for "vessel" status, thus establishing subject-matter jurisdiction in the federal courts, *see* Resp. Br. 56-57; Clermont *Amicus* Br. 4; Clermont, 91 Cornell L. Rev. at 992-96, but also held that respondent did not prove "vessel" status by a preponderance of the evidence, with the result that petitioner won the case on the merits because there could be no maritime lien, *see* Clermont *Amicus* Br. 9-10 & n.2, 13; Clermont, 91 Cornell L. Rev. at 982-83. (3) Finally, the district court could have held – as it actually did – that respondent demonstrated "vessel" status both for jurisdictional purposes and for the purpose of establishing maritime liens, with the result that respondent won the case on the merits.

In this Court, only two substantive options remain: the district court's second option (accepting jurisdiction but ruling for petitioner on the merits) is no longer open. Petitioner appealed only the jurisdictional aspect of the "vessel" status question to the Eleventh Circuit, not the underlying merits of the dispute that also turned on "vessel" status. *See* Resp. Br. 56 n.28. Petitioner's Question Presented is similarly limited to the jurisdictional issue. *See id.* at 56 & n.28. Significantly, petitioner does not disagree. *Cf.* Reply Br. 16 n.7 (challenging on multiple grounds respondent's analysis of the appropriate standard for establishing jurisdictional facts that overlap with the merits, but not disagreeing with respondent's observation that subject-matter jurisdiction is the sole issue before this Court).

Because the sole remaining issue is the existence of subject-matter jurisdiction, two outcomes are possible for this litigation: (1) this Court (or the court below on remand) could hold that the district court had subject-matter jurisdiction because the houseboat was a "vessel" under whatever standard the Court considers appropriate for establishing jurisdictional facts that overlap with the merits[9] (thus affirming the judgment below); or (2) the judgment below could ultimately be reversed if it were held that the district court lacked subject-matter jurisdiction because petitioner's houseboat was not a "vessel" under the standard that this Court finds appropriate.

Neither judgment would be "useless." Either "'judgment [would] have [an] effect.'" *Republic National Bank*, 506 U.S. at 85 (quoting *The Little Charles*, 26 F.

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[9] If the Court holds that respondent established vessel status by a preponderance of the evidence, of course, it need not decide the appropriate standard for establishing jurisdictional facts that overlap with the merits.

Cas. at 982). If this Court affirms the judgment below, respondent would retain the proceeds of the sale of the houseboat.[10] Respondent may also have additional rights, such as the right to seek an *in personam* judgment against petitioner (because the sale proceeds were insufficient to pay even the administrative expenses, *see supra* note 2, let alone the unpaid dockage fees for which petitioner is responsible). If the judgment below were ultimately reversed, on the other hand, respondent would be required to pay the sale proceeds to petitioner. That obligation is secured by respondent's $25,000 bond. At the very least, therefore, this case will determine the ultimate disposition of the sale proceeds.[11]

CONCLUSION

The present case is not moot and the judgment below should be affirmed.

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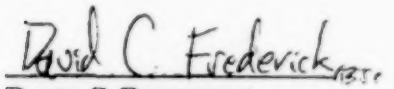
[10] As respondent obtained the houseboat with a credit-bid at the auction, *see* Resp. Br. 13 & n.8, no money changed hands. But the effect was the same as if respondent had paid $4,100 in cash and then received back the same amount (to pay some of the administrative expenses). If the sale proceeds had exceeded the administrative expenses, the excess would have been applied next to satisfy the liens (and the remainder would have been paid to petitioner).

[11] The present case is superficially similar to two *in rem* actions in which the Fifth Circuit dismissed appeals under the useless-judgment doctrine because the original *res* had been sold and the sale proceeds distributed. *See Eurasia Int'l, Ltd. v. Holman Shipping, Inc.*, 411 F.3d 578 (5th Cir. 2005); *Newpark Shipbuilding & Repair, Inc. v. M/V Trinton Brute*, 2 F.3d 572 (5th Cir. 1993) (per curiam). Those cases, even if correctly decided, are readily distinguishable. Most obviously, respondent's obligation to pay the sale proceeds to petitioner if the judgment below were to be reversed is secured by a bond whereas the Fifth Circuit in both those cases believed that it had no way to enforce repayment of the sale proceeds if the appeals in those cases had succeeded.

Respectfully submitted,



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August 28, 2012

ADDENDUM

Date

NATIONAL MARITIME SERVICES

1915 SOUTHWEST 21ST AVENUE
FORT LAUDERDALE, FLORIDA 33312
TELEPHONE: (954) 791-9601 FACSIMILE: (888) 611-4626
WATS: 800-633-7172

Date of Charges: 4/20/09-11/19/09

Type of Vessel: Houseboat

Size/NL Stock#: 60' 21208

Vessel Name: N/A

Bill To: Riviera Beach Marina
c/o Jules V. Massee
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Drive Suite 1210
Tampa, FL 33602
813-223-1900 TEL
813-223-1933 FAX
Location: Mirage Yachts Miami, FL

Date	Description	Units	Unit cost	Amount	Handling Fees	Amount Billed
4/20/2009	Mobilization, coordination & execution of arrest	1	$750.00	$750.00		$750.00
4/20/2009	Captain onboard during tow	2	$425.00	$850.00		$850.00
4/20/2009	Mate on onboard during tow	2	$425.00	$850.00		$850.00
4/20/2009	Towboat US towing	1	$6,231.25	$6,231.25	$934.69	$7,165.94
4/24/2009	Escort for Fane	2	$75.00	$150.00		$150.00
4/28/2009	Escort for surveyor	5	$75.00	$375.00		$375.00
4/29/2009	Escort for Fane, Guns returned	1.5	$75.00	$112.50		$112.50
5/6/2009	Escort for Fane, personal property	3	$75.00	$225.00		$225.00
5/9/2009	Reorganize mooring of vessel, 4 point tie up, uthilizing 1" nylon line. 4 linehandlers @ 1.75 hours.	1	$720.00	$720.00		$720.00
5/19/2009	Escort for Fane, personal property	3	$75.00	$225.00		$225.00
6/30/2009	Escort for Fane, personal property	2	$75.00	$150.00		$150.00
9/24/2009	Escort for Fane, personal property	3.5	$75.00	$262.50		$262.50
TOTAL						**$11,835.94**
Recurring Expenses						
4/20-4/30/09	Dockage @ $1.25 per/ft/day = $75.00	11	$75.00	$825.00		$825.00
5/1/09-5/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
6/01/09-6/30/09	Dockage @ $1.25 per/ft/day = $75.00	30	$75.00	$2,250.00		$2,250.00
7/1/09-7/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
8/1/09-8/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
9/1/09-9/30/09	Dockage @ $1.25 per/ft/day = $75.00	30	$75.00	$2,250.00		$2,250.00
10/1/09-10/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
11/01/09-11/19/09	Dockage @ $1.25 per/ft/day = $75.00	19	$75.00	$1,425.00		$1,425.00
4/20/2009	Liability insurance	1	$520.00	$520.00		$520.00

EXHIBIT A

Revised 11/19/2009

Case 9:09-cv-80594-WPD Document 151-1 Entered on FLSD Docket 11/19/2009 Page 1 of 2

Case 9:09-cv-80594-WPD Document 151-1 Entered on FLSD Docket 11/19/2009 Page 2 of 2

Date

NATIONAL MARITIME SERVICES

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FORT LAUDERDALE, FLORIDA 33312
TELEPHONE: (954) 791-9801 FACSIMILE: (888) 811-4628
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Riviera Beach Marina
c/o Jules V. Massee
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Drive Suite 1210
Tampa, FL 33602
813-223-1900 TEL
813-223-1933 FAX
Location: Mirage Yachts Miami, FL

5/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
6/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
7/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
8/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
9/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
10/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
11/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
Recurring Total						**$20,210.00**
Combined Total						
Balance						**$32,045.94**
						$32,045.94
	Finance charge	0.000	0.000	1.5%		**$0.00**
Sub Total						**$32,045.94**
Payment						
4/20/2009	Initial Payment	-1	$8,870.00	$8,870.00		($8,870.00)
6/25/2009	Payment by City of Riveria Beach	1	($6,743.44)	($6,743.44)		($6,743.44)
9/3/2009	Payment by City of Riveria Beach	1	($5,765.00)	($5,765.00)		($5,765.00)
Grand Total						**$10,667.50**

SUPPLEMENTAL BRIEF

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

August 28, 2012

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Fane Lozman v. The City of Riviera Beach, Florida
S. Ct. No. 11-626

Dear Mr. Suter:

On August 14, 2012, the Court directed the parties, and invited the Solicitor General, to file simultaneous letter briefs in the above-captioned case addressing the following question:

> The *res* in this putative *in rem* admiralty proceeding was sold at a judicial auction in execution of the district court's judgment on a maritime lien and a maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the *res* render this case moot?

In response to the Court's question, it is the position of the United States that the case has not been rendered moot by either the auction or the destruction of the original *res* in the proceeding, because respondent posted a $25,000 bond in the district court, which ensures that petitioner could still receive meaningful relief (from respondent) if petitioner were ultimately to prevail in the case.

1. An Article III case may become moot, or no longer "fit for federal-court adjudication," when the parties do not "retain a stake in the outcome" of the case, "not only at the outset of litigation, but throughout its course." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028, 2033 (2011) (internal quotation marks omitted). In *Camreta*, the case before this Court had become moot because the party on whose behalf the respondent had brought suit could no longer "be affected by the Court of Appeals' ruling." *Id.* at 2034; see also, *e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) ("an appeal should * * * be dismissed as moot when * * * a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)).

In the context of *in rem* proceedings, the same principle was recognized long ago in Chief Justice Marshall's observation that a federal court's jurisdiction might lapse if "the

thing" at issue was "los[t]," such that it could neither "be delivered to the libellants, nor restored to the claimants," and any judgment the court issued would be "useless." *United States* v. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, Circuit Justice); see also *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 87 (1992) (noting that, "if a defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect, a court might determine that a judgment might be useless") (internal quotation marks and citation omitted); *id.* at 89 (opinion of Blackmun, J.) (characterizing "the 'useless judgment' exception * * * to appellate *in rem* jurisdiction" as "another way" of viewing the question of mootness).

Yet, as Chief Justice Marshall also recognized, that reason for divesting the court of jurisdiction "will not apply to any case where the judgment will have any effect whatever," such as, for example, when "the parties have * * * substituted other property to abide the fate of the suit." *The Little Charles*, 26 F. Cas. at 982. Thus, although the initiation of an *in rem* proceeding ordinarily requires a valid seizure of the *res* that is the subject of the proceeding, see *Republic Nat'l Bank*, 506 U.S. at 84-85, a party may secure the release of the *res* by furnishing something else that can be substituted for it. Accordingly, Supplemental Admiralty Rule E(5)(a) to the Federal Rules of Civil Procedure expressly provides that the property at issue in an *in rem* admiralty proceeding may be released "on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court."

Such a security often takes the form of a bond, the effect of which "is to take the place of the vessel [or other *res*] which has been seized and released." 2 Thomas A. Russell, *Benedict on Admiralty* § 63, at 5-11 (7th ed. rev. 2010); see *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 38 (1960) (Whittaker, J., dissenting) ("This Court has from an early day consistently held that a bond, given to prevent the arrest or to procure the release of a vessel, is substituted for and stands as the vessel in the custody of the court.") (emphasis omitted); *United States* v. *Ames*, 99 U.S. 35, 42 (1879) (explaining that the bond given for the release of cargo "became the substitute for the property; and the remedy of the libellants, in case they prevailed in the suit *in rem* for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827) (Story, J.) (describing it as "the known course of the Admiralty" that a stipulation taken "for the property subjected to legal process and condemnation * * * is deemed a mere substitute for the thing itself," making "the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were still in its custody"); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 9-89, at 799 (2d ed. 1975) ("With respect to a lien in suit the effect of release is to transfer the lien from the ship to the fund represented by the bond or stipulation."). Cf. 28 U.S.C. 1355(c) (in a civil forfeiture action that has been appealed, "removal of the property by the prevailing party shall not deprive the court of jurisdiction"; the court may "preserve the right of the appealing party to the full value of the property at issue" by granting a stay or requiring the prevailing party to post a bond).

2. In this case, respondent filed a putative *in rem* proceeding in admiralty against petitioner's floating home on April 20, 2009. J.A. 4-10 (complaint). The structure, which respondent alleged to be a "vessel," was arrested that day by the United States Marshal and towed away. Pet. App. 8a. Three days later, the district court refused to order that the alleged vessel be returned but ordered respondent to post, within one week, "a $25,000 bond to secure [petitioner's] value in the vessel." D. Ct. Doc. No. 20 ¶¶ 1, 4, at 1-2 (Apr. 23, 2009). Respondent filed a copy of its "Security Bond" on the deadline, D. Ct. Doc. No. 26 (Apr. 30, 2009), and later filed the original with the court, D. Ct. Doc. No. 46 (May 15, 2009). In doing so, respondent and its surety promised "to pay into the registry of the Court, or as otherwise directed by Court order, all damages, costs, and interest that may be adjudged and found due to [petitioner] in an amount up to and not exceeding the sum of $25,000 in the event final judgment (after appeal, if any) is entered against [respondent]." *Id.* ¶ 4. By its terms, the "obligation" reflected in the bond "remain[s] in full force and effect" until respondent "fulfils" that obligation or until "final judgment is entered for [respondent] and against the Defendant Vessel." *Id.* ¶ 5. In January 2010, the district court entered judgment in respondent's favor, ordered that the "[d]efendant vessel" be "condemned and sold at a U.S. Marshal sale" to satisfy the judgment, and authorized respondent to "bid on its judgment or any part thereof, in lieu of cash at the public sale." D. Ct. Doc. No. 159 ¶¶ 1-3, at 1 (Jan. 6, 2010); see D. Ct. Doc. No. 186 (Feb. 26, 2010) (order amending judgment).

The auction was conducted on February 9, 2010, and respondent prevailed on a bid of $4100. See D. Ct. Doc. No. 176 ¶¶ 1, 4, at 1 (Feb. 16, 2010); D. Ct. Doc. No. 190 (Mar. 10, 2010) (bill of sale). Petitioner filed a notice of appeal, D. Ct. Doc. No. 173 (Feb. 11, 2010), and he filed "emergency motions" in both the district court and the court of appeals to stay judicial confirmation of the sale, see D. Ct. Doc. No. 171 (Feb. 10, 2010); Pet. C.A. Emergency Mot. To Stay Sale & Confirmation of Sale of the Floating Residential Structure and Motion To Stay Enforcement of D. Ct.'s Jan. 6, 2010 Order & Judgment (Feb. 22, 2010). Respondent opposed both of those motions, and both of them were denied. See D. Ct. Doc. No. 185 (Feb. 24, 2010); C.A. Docket entry (Mar. 2, 2010). The district court clerk confirmed the sale, D. Ct. Doc. No. 188 (Feb. 26, 2010), and respondent, after taking possession of petitioner's floating home, ultimately destroyed it, see Resp. Br. 13 n.9.

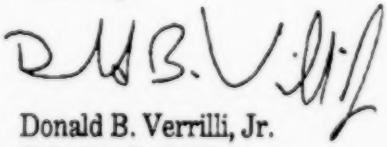
3. Neither the sale of petitioner's floating home at judicial auction, nor its subsequent destruction by respondent, deprived the courts below (or this Court) of continuing jurisdiction over the dispute between petitioner and respondent. As described above, more than nine months before the auction, respondent had filed a surety bond in the district court that pledged to pay up to $25,000 to petitioner "in the event final judgment (after appeal, if any) is entered against [respondent]." D. Ct. Doc. No. 46 ¶ 4. The bond was meant to protect petitioner's interest in the property, even if that interest could not be established until after an appeal. See S.D. Fla. Adm. & Mar. R. E(8)(a)(i) and (ii) (addressing release of property under Supplemental Admiralty Rule E(5); providing that a "stipulation, bond, or other security" that serves as "a precondition to release" must be conditioned "to pay the amount of any final judgment entered by [the District] Court *or any appellate Court*, with interest") (emphasis added). Therefore, consistent with the cases discussed above, the bond

provides a continuing basis for whatever *in rem* jurisdiction was appropriate at the outset of the suit.

Indeed, when respondent opposed petitioner's attempts to prevent the sale from being confirmed, its position on mootness was consistent with the foregoing. In the court of appeals, respondent explained that "Sale Will Not Moot This Appeal," because "'*[t]he proceeds from the judicial sale of a vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself.*'" Resp. C.A. Response in Opp. to Pet. Emergency Mot. To Stay Sale & Confirmation of Sale 16-17 (Feb. 24, 2010) (quoting *Isbrandtsen Marine Servs.* v. *M/V Inagua Tania*, 93 F.3d 728, 734 (11th Cir. 1996), in turn quoting *American Bank of Wage Claims* v. *Registry of the D. Ct. of Guam*, 431 F.2d 1215 (9th Cir. 1970)) (emphasis supplied by Eleventh Circuit). Although respondent acknowledged that there were no cash proceeds from the auction (because it had used a credit bid), it further explained that "it previously submitted a bond in the amount of $25,000.00 which remains in the registry of the District Court" and "may serve as substitute security" for petitioner's home, and, as a result, permitting the sale "will therefore not moot this appeal." *Id.* at 17. (In both the court of appeals and the district court, respondent also explained that petitioner would not suffer irreparable injury if the sale were confirmed because he could be adequately compensated by a monetary award, rather than the return of his floating home. *Id.* at 14; D. Ct. Doc. No. 176 ¶ 24, at 8 (Feb. 16, 2010).)

If petitioner prevails in this Court and ultimately succeeds in having the judgment in respondent's favor vacated, it is true that he could no longer expect to receive the relief that he contemplated before the sale and destruction of his floating home. See D. Ct. Doc. No. 181 ¶ 3, at 2-3 (Feb. 22, 2010) (reply brief supporting emergency motion to deny confirmation of sale, stating that petitioner "fully expects that his floating residential structure will be restored to the condition that it was in prior to its improper arrest and returned, at [respondent's] expense, to [respondent's] marina"). Nevertheless, it is well established that "[t]he available remedy * * * does not need to be 'fully satisfactory' to avoid mootness." *Calderon*, 518 U.S. at 150 (quoting *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992)). In light of respondent's $25,000 bond—which was intended "to secure [petitioner's] value in the vessel," D. Ct. Doc. No. 20 ¶ 4, at 2, and which is a substitute for the released *res*—this case is not moot because it is not "impossible for a court to grant any effectual relief whatever" to petitioner if he ultimately prevails. *Knox* v. *Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks and citation omitted).

Sincerely,



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cc: See Attached Service List

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SUPPLEMENTAL BRIEF

No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

CERTIFICATE OF SERVICE

The undersigned certifies that he has this 28th day of August 2012 caused one copy of the foregoing **Letter Brief for Petitioner** to be served on the below-named counsel by first-class mail, postage prepaid, and further certifies that all persons required to be served have been served:

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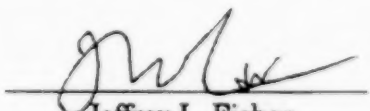

Jeffrey L. Fisher

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Stanford Law School

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August 28, 2012

Via Electronic Mail and FedEx

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: *Lozman v. The City of Riviera Beach, Florida*
Case No. 11-626
Oral Argument Scheduled for October 1, 2012

Dear General Suter,

This letter responds to the Court's supplemental briefing order of August 14, 2012. The answer to the Court's question is that neither the judicial sale nor the City's subsequent destruction of petitioner's floating home renders this case moot.

The City itself previously has explained as much. After petitioner's home was sold at the judicial auction, he filed an emergency motion in the Eleventh Circuit seeking to prevent confirmation of the sale. Lozman argued, among other things, that confirming the sale would cause him irreparable harm. The City responded that Lozman would suffer no such harm because the City had posted a security bond of $25,000 in the district court, which the City argued would be more than sufficient "compensation" if he prevailed on appeal. Appellee's Response to Appellant's Emergency Motion to Stay Sale and Confirmation of the Sale at 14 (copy attached as Appendix B; copy of the bond attached as Appendix A). The City further emphasized that the "sale will not moot this appeal" because the City's bond "remains in the registry of the District Court" and therefore "serve[s] as substitute security for the [home itself]." *Id.* at 16-17. Following that assurance, the Eleventh Circuit denied Lozman's motion to stop the sale.

The City's jurisdictional analysis in the Eleventh Circuit was correct. This Court repeatedly has held that "continuous presence of the [seized property] in the district" is not required to keep an *in rem* case from becoming moot. *Republic Nat'l Bank v. United States*, 506 U.S. 80, 85 (1992); *United States v. Ames*, 99 U.S. 35, 36 (1878); *The Rio Grande*, 90 U.S. 458, 463 (1875). In particular, where, as here, the plaintiff merely has sold it and placed the money (or a security bond for its equivalent) somewhere within reach of the district court, a live case or controversy persists over who is the rightful owner of that money. *Republic Nat'l Bank*, 506 U.S. at 92-93.

This Court applied that rule in *Republic Nat'l Bank* in the context of a seizure of a land-based home that was sold at a judicial auction while the case was pending. But this Court explained that its ruling was intended to "conform as near as may be to proceedings in admiralty." *Id.* at 84 (quotation marks and citation omitted). And federal courts of appeals sitting in admiralty have considered it "well established" both before and after *Republic Nat'l Bank* that this sale-and-guarantee-the-funds procedure keeps a case alive in the precise circumstances at issue here. *Inland Credit Corp. v. M/V Bow Egret*, 552 F.2d 1148, 1151 (5th Cir. 1977); *see also Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 424 F.3d 852, 862-63 (9th Cir. 2005) (case was not moot following sale of vessel because "the security [was] substituted for the vessel[s] as the *res* subject to the court's jurisdiction") (internal alterations in original; quotation marks and citations omitted); *Isbrandtsen Marine Servs. v. M/V Iguana Tania*, 93 F.3d 728, 734 (11th Cir. 1996) (case was not moot because "[t]he vessel was sold at an interlocutory sale and the final rights of the original plaintiffs and the owner to proceeds have not yet been decided. The proceeds of the sale are in the registry of the Court as a substitute for the *res* of the vessel."); *Am. Bank of Wage Claims v. Registry of the Dist. Ct.*, 431 F.2d 1215, 1218 (9th Cir. 1970) (sale of vessel does not moot case because "[t]he proceeds from the judicial sale of a vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself."); *The Charles D. Leffler*, 100 F.2d 759, 760 (3d Cir. 1938) (same).

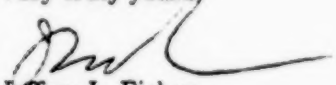
In short, the parties and the district court here followed an "often-used and legitimate practice" for maintaining jurisdiction on appeal following the judicial sale (and destruction) of petitioner's floating home. *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 983 n.20 (5th Cir. 1984). That practice prevents the case from being moot.

Even if the City never had posted a bond, the case still would not be moot. As this Court explained in *Republic Nat'l Bank*, quoting with approval its prior holding in *Rio Grande*, "[w]hen [a] vessel was seized by the order of the court and brought within its control," jurisdiction is "complete" and secure on an ongoing basis. 506 U.S. at 85 (quoting *Rio Grande*, 90 U.S. at 463); *see also id.* at 86 n.4 ("An actual or constructive seizure provides jurisdiction in an admiralty forfeiture action. 'And, having once acquired regular jurisdiction, no subsequent irregularity can defeat it; or accident, as, for example, an accidental fire.'") (quoting 1 J. Wells, A Treatise on the Jurisdiction of Courts 275 (1880)). To be sure, this Court suggested that a federal court in this situation "might" lose jurisdiction over the case if "*the plaintiff* abandons" the vessel or otherwise "renounce[s] its claim" over the *res*. *Id.* at 87 (emphasis added). In such circumstances, a judgment in the plaintiff's favor might be "useless." *Id.* (quotation marks and citation omitted). But such a legal possibility does "not apply to any case where the judgment will have any effect whatever," *Republic Nat'l Bank*, 506 U.S. at 85 (quotation marks and citation omitted) – such as insulating the plaintiff's prior actions in the lawsuit from further legal challenge.

Accordingly, any "useless judgment" doctrine – if it even exists – would not apply here. The City never has renounced its claim against petitioner's home and indeed has collected money representing its value. If this Court reverses, the district could (and should) require it to compensate Lozman for his loss, measured at least by the proceeds of the judicial sale. *See Ventura Packers*, 424 F.3d at 863 n.7. Otherwise, the admiralty rules allowing plaintiffs to instigate judicial sales of purported vessels before final judgment would "provide a prevailing party with a means of defeating its adversary's claim for redress" on appeal from an erroneous district court ruling – exactly what this Court held in *Republic Nat'l Bank*

that jurisdictional rules governing *in rem* proceedings cannot do. 506 U.S. at 85.

Very truly yours,



Jeffrey L. Fisher
Counsel for Petitioner

cc: All Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

"IN ADMIRALTY"

The City of Riviera Beach,

Plaintiff,

vs. CASE NO.: 9:09-cv-80594-WPD

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*.

Defendant.
_____/

FILED by JLS D.C.
MAY 15 2009
STEVEN M. LARIMORE
CLERK U. S. DIST. CT
S. D. of FLA. - MIAMI

NOTICE OF FILING ORIGINAL SECURITY BOND

NOTICE IS HEREBY GIVEN that the undersigned has filed with the Clerk of Court in the above-captioned matter the original Security Bond, a copy of which was previously filed under Docket No. 26.

ROBERT BIRTHISEL
Florida Bar No.: 906654
JULES V. MASSEE
Florida Bar No.: 0041554
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Dr., Suite 1210
Tampa, Florida 33602
Telephone: 813.223.1900
Facsimile: 813.223.1933
jmassee@hamiltonmillerlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to Fane Lozman, pro se claimant, by e-mail at E-mail address sp500trd@yahoo.com, this May 12, 2009.

Attorney

Bond #285031203

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

"IN ADMIRALTY"

The City of Riviera Beach,

Plaintiff,

vs. CASE NO.: 9:09-cv-80594-WPD

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*.

Defendant.
_____/

PLAINTIFF'S SECURITY BOND

Recitals

1. A Verified Complaint was filed on April 20, 2009 praying that certain unnamed gray, two-story vessel approximately fifty-seven feet in length ("Defendant Vessel") and all her engines, tackle, furnishings, equipment, appurtenances, auxiliary vessels, and necessaries thereunto appertaining and belonging, be condemned and sold to pay Plaintiff's demands and claims and for other proper relief.

2. The U.S. Marshal Service arrested the Vessel on April 20, 2009, and subsequently delivered custody to this Court's appointed substitute custodian, National Maritime Services, Inc.

3. An order was entered in the above-captioned case on April 23, 2009 in the United States District Court for the Southern District of Florida, requiring the City of Riviera Beach ("Plaintiff") to post a bond in the amount of $25,000 on or before April 30, 2009.

Promise to Pay

4. As a result of the facts just recited, the Plaintiff and Liberty Mutual Insurance Company ("Surety"), each undertakes and promises to pay into the registry of the Court, or as otherwise directed by Court order, all damages, costs, and interest that may be adjudged and found due to the owner of the Defendant Vessel in an amount up to and not exceeding the sum of $25,000 in the event final judgment (after appeal, if any) is entered against Plaintiff.

5. If final judgment is entered for Plaintiff and against the Defendant Vessel, or if Plaintiff fulfills the obligations set forth above, then this obligation will become void. Otherwise, the obligation will remain in full force and effect.

Dated: _April 29, 2009

For the principal: CITY OF RIVIERA BEACH
By Pamela H.R. [signature]
City Attorney [title of signer]

For the surety

LIBERTY MUTUAL INSURANCE COMPANY
By _____
Harold Miller Jr Attorney in Fact
2 Pierce Place
Itasca, IL 60143

SURETY ACKNOWLEDGMENT (ATTY-IN-FACT)

State of Illinois } SS:
County of Dupage

On this 29th day of April in the year two thousand nine before me, Christina Laurendi, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Harold Miller Jr.., known to me to be the duly authorized Attorney-in-fact of Liberty Mutual Insurance Company and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said Harold Miller Jr.., duly acknowledged to me that she subscribed the name of Liberty Mutual Insurance Company and thereto as Surety and her own name as Attorney-in-fact.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

My Commission Expires
6/25/2012

Notary Public in and for Christina Laurendi
County, State of Dupage, Illinois

OFFICIAL SEAL
CHRISTINA LAURENDI
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES 06/25/12

UNITED STATES DISTRICT COURT • SOUTHERN DISTRICT OF FLORIDA

ATTACHMENT(S)
NOT SCANNED/SCANNED
and are available in the
SUPPLEMENTAL PAPER FILE

PLEASE REFER TO COURT FILE MAINTAINED IN THE OFFICE WHERE THE JUDGE IS CHAMBERED

CASE NO. 09-cv-80594

Date _____

- ☐ **DUE TO POOR QUALITY**
- ☐ VOLUMINOUS (exceeds 999 pages = 4 inches)
  consisting of (boxes, notebooks, etc.) _____
- ☐ BOUND EXTRADITION PAPERS
- ☐ ADMINISTRATIVE RECORD (Social Security)
- ☐ ORIGINAL BANKRUPTCY TRANSCRIPT
- ☐ STATE COURT RECORD/TRANSCRIPT (Habeas Cases)
- ☐ SOUTHERN DISTRICT TRANSCRIPTS
- ☐ LEGAL SIZE
- ☐ DOUBLE SIDED
- ☐ PHOTOGRAPHS
- ☒ SURETY BOND (original or letter of undertaking)
- ☐ CD's, DVD's, VHS Tapes, Cassette Tapes
- ☐ OTHER = _____

2442988

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

LIBERTY MUTUAL INSURANCE COMPANY
BOSTON, MASSACHUSETTS
POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS: That Liberty Mutual Insurance Company (the "Company"), a Massachusetts stock insurance company, pursuant to and by authority of the By-law and Authorization hereinafter set forth, does hereby name, constitute and appoint

SHARON A. SONDERMAN, KAREN E. SOCHA, WILLIAM T. KRUMM, THERESA M. ADAMS, JON A. SCHROEDER, ARLENE M. FILIPSKI, HAROLD MILLER, JR., MARK R. MALLEY, RANDALL K. MOON, GARY ALAN DIENHART, ALL OF THE CITY OF ITASCA, STATE OF ILLINOIS

, each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety obligations in the penal sum not exceeding FIFTY MILLION AND 00/100********** DOLLARS ($ 50,000,000.00*****) each, and the execution of such undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents, shall be as binding upon the Company as if they had been duly signed by the president and attested by the secretary of the Company in their own proper persons.

That this power is made and executed pursuant to and by authority of the following By-law and Authorization:

ARTICLE XIII - Execution of Contracts: Section 5. Surety Bonds and Undertakings.
Any officer of the Company authorized for that purpose in writing by the chairman or the president, and subject to such limitations as the chairman or the president may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Company by their signature and execution of any such instruments and to attach thereto the seal of the Company. When so executed such instruments shall be as binding as if signed by the president and attested by the secretary.

By the following instrument the chairman or the president has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article XIII, Section 5 of the By-Laws, Garnet W. Elliott, Assistant Secretary of Liberty Mutual Insurance Company, is hereby authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

That the By-law and the Authorization set forth above are true copies thereof and are now in full force and effect.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Company and the corporate seal of Liberty Mutual Insurance Company has been affixed thereto in Plymouth Meeting, Pennsylvania this 18th day of November, 2008.

LIBERTY MUTUAL INSURANCE COMPANY

By Garnet W. Elliott
Garnet W. Elliott, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 18th day of November, 2008, before me, a Notary Public, personally came Garnet W. Elliott, to me known, and acknowledged that he is an Assistant Secretary of Liberty Mutual Insurance Company; that he knows the seal of said corporation; and that he executed the above Power of Attorney and affixed the corporate seal of Liberty Mutual Insurance Company thereto with the authority and at the direction of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.

TERESA PASTELLA COMMONWEALTH OF PENNSYLVANIA NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires Mar. 25, 2009
Member, Pennsylvania Association of Notaries

By Teresa Pastella
Teresa Pastella, Notary Public

CERTIFICATE

I, the undersigned, Assistant Secretary of Liberty Mutual Insurance Company, do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the officer or official who executed the said power of attorney is an Assistant Secretary specially authorized by the chairman or the president to appoint attorneys-in-fact as provided in Article XIII, Section 5 of the By-laws of Liberty Mutual Insurance Company.

This certificate and the above power of attorney may be signed by facsimile or mechanically reproduced signatures under and by authority of the following vote of the board of directors of Liberty Mutual Insurance Company at a meeting duly called and held on the 12th day of March, 1980.

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 29 day of MARCH, 2009.

By David M. Carey
David M. Carey, Assistant Secretary

Not valid for mortgage, note, loan, letter of credit, bank deposit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 10-10695J

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*,	
Appellant,	Appeal from the United States District Court for the Southern District of Florida
vs.	
	Lower Tribunal No. 09-80594-CIV-DIMITROULEAS/SNOW
City of Riviera Beach,	
Appellee.	

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY SALE AND CONFIRMATION OF SALE

Appellee, City of Riviera Beach ("Appellee"), by and through its undersigned counsel and pursuant to Federal Rule of Appellate Procedure 8 and 11th Circuit Rule 27, hereby responds in opposition to Appellant's Emergency Motion to Stay Sale, and Confirmation of Sale of the Floating Residential Structure

and Appellant's Motion to Stay Enforcement of the District Court's January 6, 2010 Order and Judgment.[1]

I. Preliminary Statement

The relief requested by the Claimant, Fane Lozman ("Lozman"), was sought at the District Court level and denied. On January 19, 2010, Lozman filed a Rule 62 Motion to Stay Enforcement of the District Court's January 6, 2010, Order and Judgment (DE 161, see Composite Ex. "A"), and once again, on February 5, 2010, similarly moved to stay the District Court's January 6, 2010, Order and Judgment and also moved to postpone or continue the sale of the vessel (DE 167, Composite Ex. "A"). As in the Motion currently before this Court, Lozman sought a stay essentially arguing that the court lacked subject matter jurisdiction.

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1. The Appellant's Motion is improperly styled as an "emergency" motion. Rule 27-1(b)(1) of the Eleventh Circuit Court of Appeals provides that:

> (1) [e]xcept in capital cases in which execution has been scheduled, a motion will be treated as an emergency motion only when **both** of the following conditions are present:
>
> 1. The motion will be moot unless a ruling is obtained with seven calendar days; and
>
> 2. If the order sought to be reviewed is a district court order or action, the motion is being filed within seven calendar days of the filing of the district court order or action sought to be reviewed.

Appellant failed to move this Court within seven calendar days from the District Court's Order of January 6, 2010. (DE 159, Composite Ex. "A").

On February 9, 2010, the District Court denied Lozman's multiple motions to stay. (DE 168 – 170, see Composite Ex. "B"). The District Court noted it had previously found that Lozman's vessel was a vessel for purposes of subject matter jurisdiction because Eleventh Circuit precedent clearly established the court had jurisdiction, and thus, Lozman failed to establish any likelihood of success on the merits.

After denial of his various motions to stay, on February 10, 2010, Lozman filed an Emergency Motion to Deny Confirmation of Defendant's Sale, which is currently pending before the District Court. (DE 171, see Ex. "C").[2] Although that Emergency Motion remains pending before the District Court, Lozman elected to seek identical relief by filing the Emergency Motion at issue here.

The Federal Rules of Appellate Procedure provide:

> A motion [to stay the judgment or order of a district court pending appeal] may be made to the court of appeals or to one of its judges. (A) The motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

Fed. R. App. P. 8(a)(2). Lozman's instant Motion fails to show that moving for the stay of the sale and confirmation of the same was impracticable or that the motion having been made, the District Court failed to afford the relief requested. Moving

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2. A confirmation was erroneously entered in error by the Clerk of Court at Docket 172, which was restricted by the Clerk at Docket 182.

the lower court was clearly practicable; as discussed above, Lozman in fact already requested this relief. Further, the District Court has not yet denied or "failed" to afford Lozman the requested relief. On the contrary, Lozman only filed his reply brief on February 19, 2010 (DE 181), only three days before filing a motion for identical relief with this Court. Lozman simply did not afford the District Court a reasonable opportunity to consider his submissions before bringing the issue to the Eleventh Circuit Court of Appeals. Accordingly, Lozman's Motion is not ripe and should be denied on this ground alone.

II. Applicable Standards of Review

A stay is an "intrusion into the ordinary processes of administration and judicial review," *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginia Railway Company v. United States*, 272 U.S. 658, 672 (1926). The party requesting a stay bears the burden of showing that circumstances warrant an exercise of the court's judicial discretion. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997). As outlined herein, and as already determined by the District Court, Lozman cannot meet his burden.

The court to which a motion for a stay is addressed must engage in the familiar process of weighing (1) whether the stay applicant has made a strong

showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Given the unavoidable facts of this case—and the lack of any real issue about them—this Court should deny Lozman's Motion to Stay.

III. Argument

A. Appellant Will Not Prevail on the Merits

1. The District Court Had Admiralty Jurisdiction Over the Appellant and Properly Ordered Sale of the Appellant Following Its Grant of Partial Summary Judgment and Trial on the Merits

The District Court's Order of Sale should be approved because the Court had admiralty jurisdiction over the subject matter. Under Supplemental Rule C and 46 U.S.C. § 31342, Appellee instituted this action in the District Court to foreclose its maritime lien for trespass and necessaries. In both its November 19, 2009 Order Granting Partial Summary Judgment (DE 150, Composite Ex. "D") and its January 6, 2010 Findings of Fact and Conclusions of Law (DE 158, Composite Ex. "D"), the District Court applied *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1310 (11th Cir. 2008) and concluded the Appellant was a "vessel" under the general maritime law. Therefore, it had admiralty subject matter jurisdiction over the action.

Mr. Lozman argues the District Court lacked subject matter jurisdiction over the vessel *in rem* and that the District Court should have applied Florida state law to define "vessel" for purposes of its jurisdictional inquiry. In particular, Lozman argues the Appellant is not a vessel at all, but rather a "floating structure" as that term is defined in § 327.02, Fla. Stat. Mr. Lozman also argues the Appellant never had propulsion, steering, fuel tanks, navigation gear, or other equipment customarily found on vessels and that the watercraft is neither titled nor registered as a vessel in the state of Florida. These arguments are without merit, and the District Court, sitting in admiralty, was constrained to apply federal maritime law to determine whether the houseboat is a "vessel" subject to a maritime lien under the Commercial Instruments and Maritime Liens Act, 46 U.S.C. § 31341 *et seq.*

The United States Code provides that a vessel "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The true focus of the inquiry is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 496 (2005). Thus, courts concentrate on the watercraft's capability of being used as a means of transportation, and "not [just] its present use or station." *Bd. of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1310 (11th Cir. 2008) (citing *Stewart*, 543 U.S. at 496) (applying *Stewart* "vessel" test to

determine *in rem* jurisdiction). However, "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Stewart*, 543 U.S. at 494. The intentions of the owner regarding the watercraft are irrelevant. *Bd. of Com'rs of Orleans Levee Dist.*, 535 F.3d at 1311.

Moreover, several courts have determined that a houseboat is "a vessel capable of being subjected to a maritime lien." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial No. SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968)[3] ("A houseboat is nonetheless a boat because . . . it affords a water-borne place to live with the added advantage of at least some maritime mobility. That she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) ("floating houseboat capable of being towed from one location to another is a vessel within the admiralty and maritime jurisdiction"); *The Ark*, 17 F.2d 446, 448 (S.D. Fla. 1926) (houseboat, not permanently moored, is a vessel subject to maritime liens).

Mr. Lozman's reliance on Florida state law is misplaced because this Court, sitting in admiralty, does not apply state law, but federal maritime law to determine

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3. Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding authority in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

whether the watercraft is a vessel. *See Stewart*, 543 U.S. at 494; *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917) (general maritime law governs maritime occurrences and state law must yield to the required uniformity of maritime law); *Bd. of Com'rs of Orleans Levee Dist.*, 535 F.3d at 1311. Thus, for purposes of its jurisdictional inquiry Florida's definition of a vessel or "floating structure" should not be considered.

Further, viewing the facts in a light most favorable to Appellant, the District Court found that the Appellant was a "vessel" subject to a maritime lien under federal maritime law. It is undisputed that the watercraft was arrested while floating in her slip on navigable waters at the Riviera Beach Municipal Marina. She was moored to the dock with ordinary dock lines and was not otherwise "permanently" affixed to the dock or rendered incapable of movement. In fact, she was removed from her boat slip with relative ease and towed by a motor vessel to her present location in Miami. Considering these facts, it is clear that it is "practically possible" and not merely a theoretical possibility, that the watercraft could be used as a means of transportation on water.

Mr. Lozman's argument that the watercraft never had propulsion, steering, fuel tanks or navigation gear is of no moment, since courts have found that a watercraft is a "vessel" even though it is not fitted with this type of equipment. *See Stewart*, 543 U.S. at 484,496; *Miami River Boat Yard, Inc.*, 390 F.2d at 597;

Pleason v. Gulfport Shipbuilding Corp., 221 F.2d 621 (5th Cir. 1955) (watercraft without motive power or steering, but capable of being towed, can still be used as a means of transportation on water). Moreover, the presence or absence of vessel registration is wholly irrelevant. As the District Court has already recognized, documentation and legal navigability is not the test for whether a vessel is subject to admiralty jurisdiction. (DE 150 at 8, See Composite Ex. "D") (*citing Bd. of Comm'rs of the Orleans Levee Dist.* 535 F.3d at 1311-12.

It is likewise irrelevant that Lozman considers the watercraft his primary residence, since an owner's intentions or purpose for using the vessel should not be considered by the Court. *See Bd. of Com'rs of Orleans Levee Dist.*, 535 F.3d at 1311. And Lozman's actual use of the vessel as his primary residence is equally irrelevant because the test is the watercraft's "capability" of being used as a means of transportation on water and not its present use or station.

2. Federal Law Preempts Florida Law and the Appellant Is Not Protected by the Homestead Exemption

Mr. Lozman also argues the Appellant is not subject to a federal maritime lien and forced sale because it is homestead property under Florida law. However, Lozman's arguments are without merit as federal law, in particular the general maritime law, preempts Florida state law.

An *in rem* suit against a vessel is distinctively an admiralty proceeding, and is within the exclusive province of the federal courts. *American Dredging Co. v.*

Miller, 510 U.S. 443, 446-47 (1994) (citing *The Moses Taylor,* 4 Wall. 411, 431(1867)). "The Constitution provides that the Judicial Power shall extend 'to all cases of admiralty and maritime jurisdiction. This constitutional grant of jurisdiction has been construed to mean that general maritime law is to be placed under national control in 'its substantive as well as its procedural features.'" *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 846-847 (5th Cir. 1978) (quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953)). "While states may sometimes supplement federal maritime policies, *a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.* These principles have been frequently declared and we adhere to them." *Pope & Talbot, Inc.*, 346 U.S. at 409-410 (emphasis added).

In this case, federal maritime law preempts state law regarding homestead protection under Article X, § 4(a), Florida Constitution.[4] The homestead protections raised on behalf of the Appellant directly conflict with substantive admiralty law and would act to deprive Appellee of its substantial right to a maritime lien.[5]

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4. Likewise, the definition of the term "vessel" under federal law would trump any definition found within the Florida statutes for purposes of this action.

5. It is not unprecedented for Florida's constitutional homestead exemption to be superseded by federal law. *See, e.g., United States v. Fleet*, 498 F.3d 1225, 1227, 1230-1231 (11th Cir. 2007) (holding that the substitute property

Here, the general maritime law and 46 U.S.C. §§ 31301(5)(B) and 31342 preempt Florida's homestead laws. The general maritime law preempts state law where the state law "works material prejudice to the characteristic features of the general maritime law *or* interferes with the proper harmony and uniformity of that law in its international and interstate relations." *American Dredging Co.*, 510 U.S. at 447 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917)) (emphasis added). A creditor's right to arrest a vessel and foreclose a maritime lien is a longstanding characteristic feature of maritime law and generally preempts state statutes attempting to occupy the same field. *See, e.g., The Moses Taylor*, 4 Wall. at 427; *American Dredging Co.*, 510 U.S. at 446 (state courts may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction).

The above preemptive principles apply equally to Appellee's statutory maritime rights. Even "in the absence of an express congressional command, state

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provision of the federal criminal forfeiture statute preempted Florida's constitutional homestead protection); *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 363 (11th Cir. 1994) (holding that the federal civil forfeiture statute, 21 U.S.C. § 881(a), which has no express preemption clause, nonetheless preempts the homestead exemption contained in Florida's Constitution). *United States v. One Parcel of Real Estate at 3262 S.W. 141 Ave., Miami, Dade County, Fla.*, 33 F.3d 1299, 1301 n. 6 (11th Cir. 1994) ("We have held that federal forfeiture law preempts the Florida homestead exemption from forfeiture"); *Wang v. Wang*, No. 8:07-cv-102-T-30MSS, 2007 WL 2460729, at *4 (M.D. Fla. Aug. 24, 2007) ("[p]ursuant to the Supremacy Clause, the right of the United States to enforce its lien on the Tocobaga Property supersedes any homestead rights [the owner] may have in the property," thus voiding any homestead protection)).

law is pre-empted if that law actually conflicts with federal law." *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509, 1513 (11th Cir. 1996) (holding that Ship Mortgage Act did not pre-empt Florida self-help repossession law where parties contracted to use a state law remedy, the act did not expressly pre-empt state law, *and state law did not directly conflict with federal statute*).

> Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . .

Id. at 1513-14 (quoting *Hillsborough County. Fla. v. Auto. Med.*, 471 U.S. 707, 713 (1985)). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004) ("when state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern").

i. Appellee's Suit Was Against the Appellant Vessel Not Lozman

Lozman also argues that his houseboat is homestead property and therefore exempt from forced sale by the Florida Constitution. "The purpose of the homestead exemption is to protect the family home from forced sale for debts *of the owner and head of the family . . .*" *Hospital Affiliates of Florida, Inc. v. McElroy*, 393 So. 2d 25 (Fla. 3d Dist. Ct. App. 1981) (emphasis added) (citing *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978); *In re Noble's Estate*, 73 So. 2d 873 (Fla. 1954)). Here, however, Lozman was not sued *in personam*, and Appellee is

not attempting to recover a debt that Lozman has incurred personally, but rather a debt that the vessel itself has incurred. *See Riffe Petroleum Co. v. Cibro Sales Corp.*, 601 F.2d 1385, 1389 (10th Cir. 1979) ("The vessel is considered a distinct entity responsible for its own debts. The lien is a proprietary right in the vessel itself as distinct from any personal liability"); *accord Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697 (9th Cir. 1987); *In re Marine Transit Corp.*, 94 F.2d 7, 9 (2d Cir. 1938).

Appellee's claims of maritime lien are based on the Appellant's trespass, and its provision of "necessaries," in particular dockage, to the Appellant *in rem*. Expenses incurred by avessel for wharfage or dockage are "necessaries" for purposes of the Maritime Liens Act and give rise to a maritime lien on the vessel should they not be paid. *See The Western Wave*, 77 F.2d 695 (5th Cir. 1935). Since the Appellant is deemed to be its own legal entity which is responsible for its own debts, Appellee's suit against the vessel and its claim of maritime lien are entirely valid and not precluded by Lozman's homestead exemption.

Given the foregoing, Appellant is not likely to succeed on the merits of this case and Lozman's motion should be denied.

B. Appellant Will Not Be Irreparably Harmed

Lozman argues he will be irreparably injured if the stay is not granted because he will lose the chance to recover his asset before his arguments are

considered by this Court. To satisfy Claimant's burden of proof, the threat of harm must be irreparable; indeed, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *United States v. Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983). An irreparable injury "must be neither remote nor speculative, but actual and imminent." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). As discussed previously, Lozman moved the District Court to deny confirmation of the sale. *The District Court has not yet ruled on this motion.* Accordingly, Lozman's injury, if there is one, is not actual and imminent and his motion should be denied. Further Lozman has failed to show why a monetary award would be insufficient compensation for the vessel's sale. The cases cited in support of Lozman's irreparable harm are wholly inapposite: one deals with staying discovery in a patent case, and the other with staying an injunction brought by prisoners against the Texas Department of Corrections.

C. Issuance of Stay Will Substantially Injure the Appellee

Lozman also argues Appellee will not be injured by the stay. However, Appellee submits it will be injured as Lozman has failed to post a supersedeas bond to provide security for Appellee's judgment and Appellee will continue to incur daily *custodia legis* fees as this appeal progresses. *See Peacock v. Thomas,*

516 U.S. 349, 359 n. 8. (1996) ("The district court may only stay execution of the judgment pending the disposition of certain post-trial motions or appeal if the court provides for the security of the judgment creditor."). Accordingly, granting the stay will substantially injure Appellee and Lozman's motion should be denied.

D. Issuance of Stay Will Not Serve the Public Interest

Lozman asserts staying the Appellant's sale is a matter of great public concern for owners of "floating residential structures" around the United States. However, contrary to Lozman's novel assertions regarding state rights, such a stay actually disserves the public interest because it would potentially "muddy the waters" of the general maritime law and would encroach on its uniformity throughout the United States.

The underlying landlord-tenant issues raised by Lozman are not interests of purely "local" concern, which beckon the application of Florida law. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22-23 (2004). And "[e]ven though a particular admiralty case might involve the rights and obligations of [a landlord and tenant] in a port, general maritime law should be uniform so that vessels in different ports would not have to subject themselves to the vagaries of local law." *Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, 1111 (D. Md. 1982). The position espoused by Lozman offends the uniformity of the federal maritime law by carving out a defense through which vessels could

potentially evade the enforcement of substantive rights of admiralty law. Indeed, if other states were to extend homestead protections to vessels on the navigable waters of the United States in the manner Lozman suggests, the federal maritime law would be substantially undermined.

This dispute concerns the rights and liabilities of a wharfinger and a vessel on the navigable waters of the United States, and not just a wharfinger and vessel in the State of Florida. Many vessels, whether they are from Florida, other states, or other countries, transit the navigable waters of Florida in commerce and recreation. Given the national—indeed international—character of maritime commerce in Florida, uniformity is desired, if not mandatory.

E. Sale Will Not Moot This Appeal

Lozman contends that confirmation of the sale will render an appeal moot. This Court, however, found to the contrary in *Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania*, 93 F.3d 728 (11th Cir. 1996). The Court held that although the vessel had been sold at auction, the Court had "jurisdiction in the *in rem* action since the proceeds of the sale remain[ed] in the Court's registry in lieu of the *res*. *Id.* at 733. The court reasoned:

> Furthermore, we do not view this case as moot. The vessel was sold at an interlocutory sale and the final rights of the original plaintiffs and the owner to proceeds have not yet been decided. The proceeds of the sale are in the registry of the Court as a substitute for the *res* of the vessel.... "*The proceeds from the judicial sale of a*

> *vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself.*" (citations omitted) (emphasis added).

Id. at 734. Here, although Appellee was permitted to credit bid on its judgment, it previously submitted a bond in the amount of $25,000.00 which remains in the registry of the District Court. (DE 26-2, see Exhibit "E"). This amount vastly exceeds Appellee's winning bid at the sale. Accordingly, the Appellee's bond may serve as substitute security for the Appellant and the sale of the Appellant will therefore not moot this appeal.[6]

IV. Conclusion

Appellee respectfully requests Appellant's Emergency Motion to Stay be denied and confirmation of the sale be allowed to go forward, and such other relief as this Court deems proper.

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6. Appellee would, however, request this Court, or the District Court as appropriate, to reduce the bond amount to reflect the Appellant Vessel's sale price of $4,100. Further, the relief Lozman requests should be conditioned on his posting of an adequate bond in the District Court pursuant to Federal Rule of Appellate Procedure 8(a)(2)(E) and Federal Rule of Civil Procedure 62(d).

Dated February 24, 2010 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this February 24, 2010, a true and correct copy of the foregoing has been furnished via e-mail and U.S. Mail to Philip J. Nathanson, THE NATHANSON LAW FIRM, 120 N. LaSalle Street, Suite 1000, Chicago, IL 60602, philipj@nathansonlawfirm.com.

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AMICUS CURIAE BRIEF

No. 11-626

In the Supreme Court of the United States

FANE LOZMAN, PETITIONER

v.

THE CITY OF RIVIERA BEACH, FLORIDA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce, constitutes a "vessel" under 1 U.S.C. 3, thus triggering federal maritime jurisdiction.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether a floating residential structure that is indefinitely moored and receives power and other utilities from shore is a "vessel" under 1 U.S.C. 3. Although the case arises in the context of a residential structure, and the interpretation of the statutory definition of "vessel" is relevant in this case for purposes of establishing admiralty jurisdiction and the existence of the particular maritime lien asserted by respondent, this Court's construction of the definition of "vessel" could affect the activities of a number of federal agencies.

For instance, the Secretary of Labor administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* See 33 U.S.C. 939. As

this Court has recognized, the LHWCA and the Jones Act, 46 U.S.C. 30104-30106 (2006 & Supp. IV 2010), are "mutually exclusive compensation regimes," *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 355-356 (1995), and coverage under the Jones Act depends in part on whether an employee is a "master or member of a crew of any vessel," 33 U.S.C. 902(3)(G). See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 345-346 (1991). For that reason, among others, the United States participated as amicus curiae in *Stewart* v. *Dutra Construction Co.*, 543 U.S. 481 (2005), which construed the definition of "vessel."

By virtue of delegation from the Secretary of Homeland Security, the Coast Guard has various responsibilities associated with vessels, including an obligation to inspect many categories of vessels to ensure that they comply with safety regulations, see 46 U.S.C. 3301, and an obligation to prescribe safety regulations for both inspected and uninspected categories of vessels, see, *e.g.*, 46 U.S.C. 4102 (2006 & Supp. IV 2010), 4105, 4302, 4502 (2006 & Supp. IV 2010). After this Court's decision in *Stewart*, the Coast Guard adopted a policy of declining to inspect "craft that routinely operate dockside and do not normally get underway" when they "cannot be considered a vessel." 74 Fed. Reg. 21,814-21,815 (May 11, 2009). The extent of the Coast Guard's regulatory authority also affects the enforcement of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, which does not apply to working conditions with respect to which another federal agency exercises authority over occupational safety and health, see 29 U.S.C. 653(b)(1).

The Court's decision could also affect operations of the Maritime Administration (MarAd), within the Department of Transportation. MarAd oversees policies and programs intended to support and encourage a via-

ble and healthy maritime transportation industry, see 46 U.S.C. 50101 (2006 & Supp. IV 2010), 50103, and thus has an interest in greater certainty about the scope of admiralty jurisdiction. MarAd also owns and operates the National Defense Reserve Fleet, comprising formerly active vessels that may be moored for extended or indefinite periods of time and maintained in various states of readiness. 46 U.S.C. 57101.

STATEMENT

1. Section 3 of the Rules of Construction Act provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. This Court has recognized that Section 3's definition, which "has remained virtually unchanged from 1873 to the present," "codified the meaning that the term 'vessel' had acquired in general maritime law," and it "continues to supply the default definition of 'vessel' throughout the U.S. Code, 'unless the context indicates otherwise.'" *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 489-490 (2005) (quoting 1 U.S.C. 1).

In *Stewart*, the Court explained that "a 'vessel' is any watercraft practically capable of maritime transportation," as opposed to one for which "use 'as a means of transportation on water' is * * * merely a theoretical [possibility]." 543 U.S. at 496, 497. *Stewart* held that the *Super Scoop*—a large dredge that was used to dig a ¾-mile-long trench across Boston Harbor—was a "vessel" because, notwithstanding its "limited means of self-propulsion," the dredge had routinely "transport[ed] equipment and workers over water" in the course of its work. *Id.* at 484, 495. The Court contrasted that result with earlier cases in which a floating drydock and a float-

ing wharfboat were correctly found not to be vessels because they were permanently moored to a dock or "affixed to shore," and were therefore "not *practically* capable of being used to transport people, freight, or cargo from place to place." *Id.* at 493 (discussing *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625 (1887), and *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19 (1926)).

2. Respondent brought an *in rem* action in federal district court against petitioner's floating home, seeking to enforce a maritime lien and seeking damages for an alleged maritime trespass. Pet. App. 2a, 7a-8a. The district court's admiralty jurisdiction and the existence of respondent's asserted lien both depend on whether respondent has established that petitioner's floating home was a "vessel." See 28 U.S.C. 1333(1) (providing federal district courts with jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction"); *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534-535 (1995) (admiralty jurisdiction over a tort claim depends in part on the injury's being "caused by a vessel on navigable water"); 46 U.S.C. 31342(a) (providing that a maritime lien is established when a person "provid[es] necessaries to a vessel").

The structure at issue in this case was a floating, two-level residence built primarily of plywood. J.A. 38. It was approximately 60 feet long and 12 feet wide and had a draft of approximately 10 inches. J.A. 37. The structure had no motive power or steering of its own. Pet. App. 18a. At least three of its four sides featured a pair of glass-paned double doors. J.A. 44-45. The first level of the interior included a main living room, a hallway, a kitchen, a bedroom, a closet, a "bathroom with domestic sink, medicine cabinet, domestic style toilet, tub [and]

shower," and several domestic-style appliances (an air conditioner, a stove and oven, a dishwasher, and a refrigerator/freezer). J.A. 39-40, 42, 55-56, 58-63. The second level included an office that opened onto a sun deck. J.A. 39.

Petitioner purchased the structure in 2002, and had it towed at least 200 miles from a location near Fort Myers, Florida, to North Beach Village, Florida. Pet. App. 3a; J.A. 71. He lived in the structure in two different marinas in North Bay Village until October 2005, when a hurricane destroyed the docks next to which it was moored. J.A. 73-74, 77-78. In March 2006, petitioner had it towed approximately 70 miles to the City of Riviera Beach, where he continued to use it as his primary residence until April 2009. Pet. App. 3a, 19a n.9. During those three years, the structure was moored by cables to a dock in a marina owned by respondent City of Riviera Beach. *Id.* at 3a, 18a. It received electrical power from land and was "connected continuously to city water." *Id.* at 18a; J.A. 31, 33.

Between August 2006 and March 2009, respondent repeatedly contended that petitioner was in violation of conditions contained in their original dockage agreement or a revised agreement that petitioner refused to sign, and that petitioner had fallen behind in his dockage-fee payments. J.A. 5-6; Pet. App. 5a-6a. Ultimately, in March 2009, respondent informed petitioner that he must pay his account in full, sign the new agreement, and bring the structure into compliance with its terms, or face legal proceedings for trespass and foreclosure on respondent's asserted maritime lien on the structure. Pet. App. 7a.

3. On April 20, 2009, respondent initiated the promised legal proceeding by filing an *in rem* complaint in

admiralty against the structure in the United States District Court for the Southern District of Florida. Pet. App. 7a-8a. The first count of the complaint sought to enforce a "statutory maritime lien for the provisioning of necessaries, specifically safe harbor and dockage, to the Defendant Vessel in the total amount of $1,464.38 for past due charges." J.A. 8. The second count sought damages for the maritime tort of trespass because petitioner failed "to remove the Vessel from its berth by April 1, 2009." J.A. 8-9. On the day the complaint was filed, the district court issued a warrant for the arrest of the defendant structure, and it was towed approximately 80 miles to Miami, Florida. Pet. App. 8a.

In August 2009, respondent moved for partial summary judgment on its trespass claim. As relevant here, petitioner opposed the motion on the ground that the district court lacked jurisdiction over the case "because his floating residential structure is not a vessel." Pet. App. 38a. The district court granted respondent's motion, holding in relevant part that the structure was a "vessel" for purposes of admiralty jurisdiction. *Id.* at 40a-42a.

Following a bench trial, the district court entered judgment in favor of respondent on both counts. Pet. App. 9a. With respect to the maritime lien, the court found that petitioner had been delinquent in the amount of $3039.88, and with respect to the trespass, it awarded nominal damages of $1. *Ibid.* The court entered final judgment on February 25, 2010, and ordered that the defendant structure be sold to satisfy the judgment. *Id.* at 9a-10a. On March 4, 2010, respondent purchased the structure. *Id.* at 10a.

4. On appeal, petitioner contended, as relevant here, that his floating home was not a "vessel" subject to fed-

eral admiralty jurisdiction. Pet. App. 11a. The court of appeals affirmed. *Id.* at 1a-32a.

The court of appeals concluded that, under "binding [Circuit] precedent," Pet. App. 12a, petitioner's floating structure was a "vessel." The Eleventh Circuit had previously held that "any definition of 'vessel' that relies on [a boat's] purpose" was inconsistent with *Stewart*. *Board of Comm'rs* v. *M/V Belle of Orleans*, 535 F.3d 1299, 1311 (2008) (*Belle of Orleans*). Applying that test, the court of appeals concluded that it is irrelevant whether the structure is "moored to a dock by cables, receive[s] power from land, and ha[s] no motive power or steering of its own." Pet. App. 18a. As long as the structure is "capable of moving over water, *albeit to her detriment*, and [is] capable of being transported under tow," then it "is a 'vessel' for purposes of admiralty jurisdiction." *Ibid.* (quoting and adding emphasis to *Belle of Orleans*, 535 F.3d at 1312). The court found that petitioner's floating home not only was capable of being towed, but "*was* towed several times over considerable distances." *Ibid.* It thus concluded that the structure "was practically capable of transportation over water by means of a tow, despite having no motive or steering power of its own." *Id.* at 21a.

In reaching its decision, the court of appeals explained that it had already "rejected the reasoning" of decisions by the Fifth and Seventh Circuits, which it construed as improperly "focus[ing] on the intent of the shipowner." Pet. App. 16a (quoting *Belle of Orleans*, 535 F.3d at 1311; discussing *Pavone* v. *Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), and *Tagliere* v. *Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006)). The court also deemed it "of little moment" that petitioner claimed his structure "was designed as a resi-

dence that just happened to float," because, in the court's view, vessel status "does not depend in any way on either the purpose for which the craft was constructed or its intended use." *Id.* at 19a.[1]

SUMMARY OF ARGUMENT

The term "vessel" is defined as including an "artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. In applying that definition, this Court has repeatedly distinguished between structures with a transportation function and fixed structures, whose function involves remaining in place on the water. Whether a structure is a "vessel" depends in significant part on its purpose or function, as indicated by objective criteria, including whether it remains essentially stationary while it is in use, and is therefore not practically capable of being used for maritime transportation.

A. The mere ability to float and be towed across water is not sufficient to establish that a structure is a "vessel." The court of appeals' contrary conclusion is inconsistent with several of this Court's decisions. In *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), the Court held that a floating wharfboat that was moored to a dock on the shore of the Ohio River was "not practically capable of being used as a means of transportation," because, while in service there, it "remained at the same point" and "did not en-

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[1] The court of appeals also upheld the district court's "factual findings regarding the amount [petitioner] owed under [respondent's] maritime lien for necessaries," Pet. App. 25a; sustained the district court's rejection of petitioner's affirmative defense that respondent's suit was impermissibly motivated by retaliation, *id.* at 25a-29a; and concluded that respondent's claims were not barred by estoppel, *id.* at 29a-32a.

counter perils of navigation to which craft used for transportation are exposed." *Id.* at 21, 22. It was therefore not a vessel, notwithstanding the Court's acknowledgment that, during its life, it had been repeatedly towed among three locations where it was used as a wharfboat, one location where it was repaired, and another location where it spent every winter. *Id.* at 20-21. The Court recently reaffirmed that the Evansville wharfboat was not a vessel under 1 U.S.C. 3, and endorsed other cases in which non-vessels had been towed. See *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 493-494, 496 (2005).

B. A structure's purpose or function should be considered when analyzing whether it is practically capable of being used for marine transportation. The text of 1 U.S.C. 3 presumes that a vessel has a discernible function because it uses the term "contrivance," which refers to something that was made or adapted with a design or purpose. In *Stewart*, the Court held that a dredge was a vessel because its "function was to move through Boston Harbor" as it dug a trench and it was therefore "used to transport" equipment and workers across the harbor. 543 U.S. at 495 (citation and internal quotation marks omitted). And the Court explained long ago that a chief consideration in determining vessel status is "the purpose for which the craft was constructed, and the business in which it is engaged." *The Robert W. Parsons*, 191 U.S. 17, 30 (1903). Moreover, a vessel's purpose or function is relevant to other common maritime-law questions.

C. In determining whether a structure is a vessel, its purpose or function should be considered on the basis of objective criteria, rather than the owner's subjective intentions. That is consistent with the statute's reference to what the structure is "capable" of being used as and with this Court's focus on "practical[]" capability. *Stew-*

art, 543 U.S. at 496. Evaluating purpose and function on the basis of objective criteria—which change less quickly than subjective intentions—will also minimize the likelihood that a "watercraft [will] pass in and out of" vessel status, *id.* at 495, or that its status will be subject to manipulation.

D. When a floating structure's function is to remain stationary near the shore, it is often not practically capable of being used for maritime transportation. In implementing this Court's decision in *Stewart*, the Coast Guard has established a policy to identify when "Craft Routinely Operated Dockside" are not "vessels" and thus not required to be inspected. That policy identifies several relevant, objective factors, including whether the structure has "practical access to navigable water," how it is "affixed to the shore," whether it would be "endangered because of its construction" if it "were operated in navigation," whether it can "get underway" in less than eight hours, and its "purpose, function, or mission." 74 Fed. Reg. 21,814-21,815 (May 11, 2009). The court of appeals erred in denying the relevance of virtually all of those factors.

E. The district court and court of appeals focused inordinately on whether it could be "mov[ed] over water, albeit to her detriment." Pet. App. 18a, 42a (citation omitted). Although some evidence tends to support petitioner's contention that his home was not a vessel, there are no determinations (and little evidence) about its purpose or function, its design, or how suitable it was for being towed or for being used as a means of transporting people, freight, or cargo. This Court should vacate the decision of the court of appeals and remand to allow the courts below to determine in the first instance whether there are any genuine disputes of material fact bearing

on the vessel-status question, on which respondent bears the burden of proof.

ARGUMENT

WHETHER A STRUCTURE IS A "VESSEL" DEPENDS IN SIGNIFICANT PART ON ITS OBJECTIVE PURPOSE OR FUNCTION, INCLUDING WHETHER IT REMAINS ESSENTIALLY STATIONARY NEAR THE SHORE WHILE IN USE

Section 3 of the Rules of Construction Act defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. That definition, which is essentially unchanged since 1873, was and is consistent with the term's established meaning in general maritime law. See *Stewart* v. *Dutra Constr. Corp.*, 543 U.S. 481, 489-490, 492 (2005). Because the definition applies in myriad federal statutes—except where "the context indicates otherwise," 1 U.S.C. 1; see *Stewart*, 543 U.S. at 490—its construction affects the scope of admiralty jurisdiction and the application of various statutory schemes in ways that sometimes benefit civil plaintiffs (*e.g.*, by providing generous protections for crew members under the Jones Act, 46 U.S.C. 30104 (Supp. IV 2010)) and sometimes benefit civil defendants (*e.g.*, by capping certain liabilities at the value of a vessel and its freight, 46 U.S.C. 30505). The scope of the definition also affects the border between non-overlapping regulatory authorities of different federal agencies (see p. 2, *supra*), and, in some instances, the border between the applicability of federal and state law, see *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513

U.S. 527, 545-546 (1995).[2] See generally 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-6, at 109 (4th ed. 2004) (Schoenbaum).

The various rules that turn on the presence or absence of a "vessel" are predicated on the long-settled background understanding that a vessel is "a means of maritime transportation," *Stewart*, 543 U.S. at 491, that therefore exposes itself and its crew, passengers, or cargo to the many "perils of navigation," *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (*Evansville*); see also *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368 (1995) (explaining that the purpose of requiring Jones Act seamen to have a "connection to a vessel" is to single out those whose employment "regularly expose[s] them to the perils of the sea"); *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920) (explaining that maritime liens are necessary because a vessel's "function is to move from place to place"). In this case, the court of appeals adopted an unduly broad construction of the term "vessel" because it lost sight of the fundamental distinction—recently reiterated in *Stewart*—between structures with a transportation function and those whose function involves remaining in place on the water.

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[2] Even when a structure is not a vessel, that does not necessarily mean that admiralty jurisdiction cannot attach to any incident in which it is involved. Some "fixed structures completely surrounded by water" are navigational aids that may trigger admiralty jurisdiction. See *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360 (1969). And when a non-vessel is being towed by a vessel, an accident involving it could well be "on navigable water" or "caused by a vessel on navigable water" and have a sufficient "relationship to traditional maritime activity" for there to be admiralty jurisdiction over an alleged tort. *Jerome B. Grubart*, 513 U.S. at 534 (citation omitted); see 28 U.S.C. 1333(1); 46 U.S.C. 30101(a).

A. The Mere Ability To Float And Be Towed Across Water Is Not Sufficient To Establish That A Structure Is A "Vessel"

The court of appeals concluded that petitioner's floating home was a "vessel" for essentially one and only one reason: because it "was towed several times over considerable distances." Pet. App. 18a (emphasis omitted). In the court of appeals' view, that fact sufficed to establish that the structure had a "practical capacity for transportation over water." *Id.* at 19a. The court thus dismissed evidence of the floating home's design as being "of little moment," *ibid.*, and it even indicated that evidence that the home "sustained serious damage" when it was towed would be immaterial, in light of a previous case holding that a riverboat casino, the *Belle of Orleans*, "was capable of moving over water, *albeit to her detriment*," and was therefore a vessel. *Id.* at 18a (quoting and adding emphasis to *Board of Comm'rs* v. *M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)). While the court of appeals' test may have the virtue of relative simplicity, it is flatly inconsistent with several cases whose viability was reaffirmed in *Stewart*.

In the context of construing 1 U.S.C. 3, *Stewart* discussed and embraced "the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore." 543 U.S. at 493. In the latter category were, *inter alia*, the wharfboat in *Evansville*, *supra*, and the floating drydock in *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625 (1887), neither of which was a "vessel." As those decisions recognized, a floating structure is not a "means of transportation" merely because the structure itself is capable of being transported over water.

1. The wharfboat in *Evansville* provides an especially clear illustration of the court of appeals' error here, because this Court found that the wharfboat was not a vessel even though it had been repeatedly towed from one location to another.

When the wharfboat was in use in Evansville, Indiana, "it was secured to the shore by four or five cables and remained at the same point except when moved to conform to the stage of the river" (*i.e.*, moved closer to or farther from the center of the river as the river rose or fell). *Evansville*, 271 U.S. at 21. "It served at Evansville as an office, warehouse and wharf," storing freight and enabling people and freight to move between riverboats and docks leading to the shore. *Id.* at 22.[3] Local water, electricity, and telephone lines all ran from shore to the wharfboat. *Id.* at 21. Observing that the wharfboat "was not taken from place to place" and that it "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land," the Court held that the floating wharfboat was not a "vessel" because "[i]t was not practically capable of being used as a means of transportation." *Id.* at 22.

As relevant here, however, the Court focused exclusively on what the wharfboat did "*at Evansville*" when stating that it "was not taken from place to place." 271 U.S. at 22 (emphasis added). For, as the Court explained in detail, the wharfboat had been towed repeatedly from one location to another. Between 1884 and 1922, it had been used at locations in Hopefield, Arkansas; Louisville,

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[3] Pictures of the wharfboat at issue appear in the Transcript of Record, *Evansville*, *supra* (No. 127) (between pages 38 and 39); see also *id.* at 37, 59 (testimony about docks situated between the wharfboat and the shore).

Kentucky; and Evansville, Indiana. *Id.* at 20. It had twice been towed to Madison, Indiana, for repairs. *Ibid.* Even after it was put in use at Evansville, it was towed every winter between 1915 and 1922 from its location in the Ohio River "to Green River harbor to protect it from ice." *Id.* at 20-21.[4] The opinion in *Evansville* also cites (*id.* at 22) two other cases that expressly observed or held that a structure's ability to be towed does not make it a "vessel." See *Patton-Tully Transp. Co.* v. *Turner*, 269 F. 334, 337 (6th Cir. 1920) (assuming that a wharfboat with a derrick that was "firmly moored to the land[] would be outside the maritime jurisdiction, even though it was contemplated that it might, on occasion, be towed to another location"); *Ruddiman* v. *A Scow Platform*, 38 F. 158, 158 (S.D.N.Y. 1889) (holding that a floating platform was not a vessel; noting it "was mainly stationary, and rarely moved," though "it was capable of being towed from one wharf to another").

Stewart concluded that *Evansville* is consistent with, and not a "narrow[ing]" of, Section 3's definition of "vessel," 543 U.S. at 493, thus demonstrating that the ability to be towed across water cannot suffice to make a structure practically capable of being used as a means of transportation.

2. Other cases cited by *Stewart* are consistent with that conclusion. In *Cope*, the Court held that a floating drydock that had been chained for 20 years in the same place on the bank of the Mississippi River was not a vessel. 119 U.S. at 627; see *ibid.* ("A fixed structure * * * is[] not used for the purpose of navigation * * * . The

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[4] The opinion in *Evansville* does not mention whether the structure was used as a wharfboat during its winters in the Green River harbor, but the parties' briefs stated that it was not in use at those times. Appellant's Br. at 3 and Appellees' Br. at 3, *Evansville*, *supra* (No. 127).

fact that it floats on the water does not make it a ship or vessel."). The Court noted that the drydock had "been put in position by being permanently moored," but it did not attach any significance to how the drydock had come to be in that place, or whether it could be moved somewhere else if it were unchained. *Ibid.*; see *Patton-Tully Transp. Co.*, 269 F. at 337 (noting that the drydock in *Cope* was "doubtless * * * capable of being towed from place to place"). Instead, *Cope* categorically compared the drydock to "a floating-bridge, or meeting-house, permanently moored or attached to a wharf," 119 U.S. at 630—even though such structures often would have been transported over water to their mooring. See *id.* at 627 (describing "[a] sailor's floating bethel, or meeting-house, moored to a wharf[] and kept in place by a paling of surrounding piles" as a "fixed structure").

Stewart also approvingly cited the Fifth Circuit's decision in *Pavone* v. *Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (1995), as an example of a structure that was "no longer a vessel where it 'was moored to the shore in a semi-permanent or indefinite manner.'" 543 U.S. at 494 (quoting *Pavone*, 52 F.3d at 570). This Court's use of the phrase "semi-permanent or indefinite" —rather than words such as "permanent" or "irreversible"—implicitly recognized that a structure's susceptibility to *some* future movement does not necessarily make it a vessel.[5] Moreover, *Pavone* explained that the barge at issue there had been used as a floating restaurant and bar or as a casino in three different locations

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[5] *Stewart* acknowledged that not even "permanent" means unalterably so. See 543 U.S. at 496 ("A ship * * * [that is] *permanently* moored to shore or the ocean floor can be cut loose and made to sail.") (emphasis added).

(two in Texas and one in Mississippi), and that it had been towed among them. 52 F.3d at 563-564.

Finally, another passage in *Stewart* (543 U.S. at 496) referred to formerly active ships in two cases as examples of structures that had "los[t] their character as vessels," even though they were towed between different locations during their non-vessel phase. See *Roper* v. *United States*, 368 U.S. 20, 21, 23 (1961) (deactivated Liberty ship towed between its moorings and a grain-loading facility); *West* v. *United States*, 361 U.S. 118, 119-120 (1959) (deactivated Liberty ship towed from Norfolk, Virginia, to Philadelphia).

In short, the narrow focus of the decision below on whether a structure can be towed over water cannot be reconciled with the holdings of the foregoing cases, each of which *Stewart* considered to be consistent with Section 3's definition of "vessel."[6]

B. The Purpose Or Function Of A Structure Should Be Considered When Analyzing Whether It Is Practically Capable Of Being Used For Marine Transportation

As part of its focus on whether a craft can be towed across water, the court of appeals rejected any consideration of "either the purpose for which the craft was con-

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[6] Of course, the fact that a structure does not have its own means of propulsion and can engage in transportation only when towed does not prevent it from being a "vessel." See, *e.g.*, *Stewart*, 543 U.S. at 484 (noting that the *Super Scoop* was "moved long distances by tugboat" and negotiated "short distances by manipulating its anchors and cables"); *Norton* v. *Warner Co.*, 321 U.S. 565, 571 (1944) ("A barge is a vessel * * * even when it has no motive power of its own, since it is a means of transportation on water."); *The Robert W. Parsons*, 191 U.S. 17, 31-32 (1903) (noting that canal boats on the Erie Canal, which were vessels, were drawn by horses to Albany and then "taken by a steamer in tow to New York or Jersey City").

structed or its intended use." Pet. App. 19a. It believed that this Court had "clearly rejected any definition of 'vessel' that relies on such a purpose," *id.* at 16a (quoting *Belle of Orleans*, 535 F.3d at 1311), because *Stewart* specified that Section 3 "does not require that a watercraft be used *primarily*" as a means of transportation, 543 U.S. at 495.

While *Stewart* did decline to require that transportation be a vessel's *primary* purpose, it did not disavow any inquiry into purpose. Indeed, a refusal to consider a structure's purpose or mission is inconsistent with the text of 1 U.S.C. 3, with this Court's application of that statute in *Stewart*, and with maritime law's long-established approach to defining the term "vessel." Nor can it be said that searching for a vessel's purpose is folly, as resolution of other maritime-law questions necessarily takes account of a vessel's purpose, function, or mission.

1. The statutory text presumes that a "vessel" has a discernible purpose or function

The text of 1 U.S.C. 3 itself strongly implies that a "vessel" has a discernible purpose or function, because it recognizes that a vessel is an "artificial contrivance." Since the statute was first enacted, the plain meaning of the words in that phrase has indicated that the thing in question is man-made ("artificial") and that, as a "contrivance," it was made (or adapted) with a design or purpose. See 3 *Oxford English Dictionary* 850 (2d ed. 1989) (defining "contrivance" as "something contrived for, or employed in contriving to effect a purpose"); 2 *Oxford English Dictionary* 926 (1933) (same); *Webster's New International Dictionary* 580 (2d ed. 1958) (defining "contrive" as "[t]o fabricate as a work of art or ingenuity; design; invent"; and defining "contrivance" as "state of

being contrived; disposition of parts or causes by design; adaptation"); 1 Noah Webster, *An American Dictionary of the English Language* s.v. contrive (1828) (illustrating "contrive" with the following: "Our poet has always some beautiful design, which he first establishes, and then *contrives* the means which will naturally conduct him to his end.").

Moreover, whether a structure is "used, or capable of being used, as a means of transportation on water" (1 U.S.C. 3) itself focuses on how the structure is capable of functioning (*i.e.*, achieving the purpose of transportation). That text plainly requires more than that the structure have the capacity to float or to *be* transported over water. It requires that the structure be practically capable of *doing* the transporting of persons or goods (*i.e.*, that it be a suitable "means" of transportation).

2. This Court has often considered a structure's purpose or function in determining whether it was a "vessel"

Consistent with those textual indications, this Court has often considered a structure's purpose or function in determining whether it was a "vessel."

Although the court of appeals read *Stewart* as precluding *any* inquiry into a potential vessel's "purpose," Pet. App. 16a, this Court specifically referred to the dredge at issue in *Stewart* as a "special-purpose vessel[]," 543 U.S. at 494, and it affirmatively invoked the dredge's function in explaining that it had been used to transport things. It explained that "the *Super Scoop*'s *function* was to move through Boston Harbor, . . . digging the ocean bottom as it moved," and that it had in fact been "used to transport" equipment and workers as it "traverse[d]" the harbor. *Id.* at 495 (emphasis added; citation and internal quotation marks omitted). Thus, the

dredge's operations were inherently waterborne, and transportation across the water was critical to its ability to function and achieve its purpose.

Such express consideration of a putative vessel's purpose or function has a long pedigree. In *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court held that a canal boat was a vessel and was distinct from land-like structures such as a "dry dock," "ferry bridge or sailors' floating meeting house," which were "no more used for the purposes of navigation than a wharf or a warehouse projecting into or upon the water." *Id.* at 34. It summarized its standard as follows: "neither size, form, equipment nor means of propulsion are determinative factors upon the question of [admiralty and maritime] jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." *Id.* at 30.

That sentiment closely echoed an earlier treatise on admiralty law, which had stated as follows: "It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft, as an instrument of naval transportation." Erastus C. Benedict, *The American Admiralty* § 218, at 117 (3d ed. 1894); see Erastus C. Benedict, *The American Admiralty* § 218, at 121 (2d ed. 1870) (same). And subsequent treatises have repeated the same maxim. See 1 Steven F. Friedell, *Benedict on Admiralty* § 164, at 10-6 (7th ed. rev. 2011); 1 Erastus C. Benedict, *The American Admiralty* § 53, at 74 (5th ed. 1925); Schoenbaum § 3-6, at 110 ("The most basic criterion used to decide whether a structure is a vessel is the *purpose* for which it is constructed and the business in which it is engaged.").

Many of the other decisions discussed above affirmatively invoked a structure's purpose or function when analyzing whether it was a "vessel." For instance, in *Evansville*, the Court cited *The Robert W. Parsons* and concluded that the Evansville wharfboat "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land." 271 U.S. at 22. In *Roper*, the Court concluded that the S.S. *Harry Lane* was not a vessel at the relevant time because its "function" was to "stor[e] grain until needed," not "to transport commodities from one location to another." 368 U.S. at 23. The Court found those structures not to be vessels, based on their functions, without inquiring into whether the wharfboat had its furnishings or any personnel on it when it was being towed, and despite the fact that the *Harry Lane* had grain and personnel on it while it was being towed. *Ibid.* In *Cope*, the Court concluded that structures "attached to a wharf" were not vessels and contrasted them with a barge that "was a navigable structure used *for the purpose* of transportation." 119 U.S. at 630 (emphasis added); see also *Ruddiman*, 38 F. at 158 (holding that floating platform was not a vessel "because it was not designed or used for the purpose of navigation * * * nor in the transportation of persons or cargo").

Because *Stewart* itself considered the *Super Scoop*'s "function" and reaffirmed that *Evansville*, *Roper*, and *Cope* are consistent with 1 U.S.C. 3, the court of appeals erred in concluding that it was foreclosed from considering any evidence of the purpose or function of petitioner's floating home.

3. Resolution of other maritime-law questions also turns on a vessel's purpose or function

Even outside the context of determining whether a structure is a vessel, maritime-law questions often depend upon a particular vessel's purpose or function.

For example, a critical threshold question in many Jones Act cases is whether an injured employee was a "seaman." 46 U.S.C. 30104 (Supp. IV 2010). *Stewart* reiterated that, even when an employee works on a "vessel," he is still not a Jones Act seaman unless "his duties contribute[] to the vessel's function or mission." 543 U.S. at 494; see also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 355 (1991) ("the requirement that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission captures well an important requirement of seaman status") (brackets and internal quotation marks omitted).

Similarly, when a vessel is subject to Coast Guard inspection, that inspection process must ensure, *inter alia*, that the vessel "is of a structure suitable for the service in which it is to be employed." 46 U.S.C. 3305(a)(1)(A). And determining whether an owner is liable for providing an "unseaworthy" vessel depends in part on the vessel's purpose. See *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 317 n.3 (1964) ("The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended[.]").

In fact, respondent's own attempt to enforce a maritime lien for the provision of "necessaries" presupposes that petitioner's structure had a discernible purpose or function. Respondent alleges (J.A. 5, 8) that it provided "safe harbor and dockage," establishing a maritime lien

under 46 U.S.C. 31342(a). Although those services are not included in the statutory definition of "necessaries," that definition is introduced by the word "includes" and has generally been understood to be a nonexhaustive list.[7] But the standard for determining whether unenumerated items are "necessaries" is whether they are "things which a careful and provident owner would provide to enable [the vessel] to perform well *the functions* for which, as a maritime agent, she has been designed and engaged." 2 Thomas A. Russell, *Benedict on Admiralty* § 35, at 3-20 (7th ed. rev. 2010) (emphasis added); see also Schoenbaum § 9-3, at 530 ("[T]he term 'necessaries' is broadly construed by the courts to mean any goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her *particular function.*") (emphasis added; internal quotation marks omitted).

Accordingly, there is nothing unusual or untoward about having to determine a structure's purpose or function in deciding whether it is to be a vessel.

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[7] The definition reads as follows: "'necessaries' includes repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. 31301(4). That definition was the product of a codification that omitted the catch-all term "other necessaries," which had previously appeared at 46 U.S.C. App. 971 and 972 (Supp. V 1987). The accompanying House Report said: "As in all codifications, the term 'includes' means 'includes but is not limited to' and, therefore, is not intended to be an exclusion [*sic*] listing of those items that a court has determined or may determine as falling within the meaning of the term 'other necessaries' as contained in current law." H.R. Rep. No. 918, 100th Cong., 2d Sess. 36 (1988). Cf. *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010) ("[T]he word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive.").

C. A Structure's Purpose Or Function Should Be Considered In Light Of Objective Criteria Rather Than The Owner's Subjective Intentions

Although the court of appeals erred in declining altogether to consider a structure's "purpose" or "its intended use," Pet. App. 19a, that court was appropriately wary of basing its decision on bare evidence of "an owner's intentions," *id.* at 16a. The statutory text and this Court's cases indicate that a putative vessel's purpose or function should be determined in light of its inherent qualities and circumstances—not merely on what the owner may happen to intend for it at a given time.

According to Section 3, a vessel must be "used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. Just as the owner's state of mind is not needed to determine how a structure is actually "used," neither does it govern what the structure is "capable" of being used as. Instead, a structure's capabilities are inherent in its own attributes and circumstances. See 2 *Oxford English Dictionary* 856 (2d ed. 1989) (defining "capable" as "[h]aving the needful capacity, power, or fitness for (some specified purpose or activity)"); *Webster's New International Dictionary* 395 (2d ed. 1958) (defining "capable" as "[h]aving ability or fitness"). This Court's focus on whether a structure is "practical[ly]" (instead of "theoretical[ly]") capable of transportation use is a further indication that real-world circumstances control, not what is in the owner's head. *Stewart*, 543 U.S.C. at 496.[8] And so is the observation that Section 3

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[8] The Court's distinction between the practical and the theoretical also supports petitioner's observation (Pet. Br. 20-21 & n.7) that Section 3 uses "capable" in the sense of what something is "*suited*" for, rather than what is "within the realm of conceivability."

does not apply to the "array of fixed structures not *commonly thought of* as capable of being used for water transport." *Id.* at 494 (emphasis added).

Of course, an owner may act on subjective intentions in ways that directly affect his property's fitness for certain uses. Repairing or otherwise improving a structure might give it new capabilities (or revive dormant ones); by the same token, it could be dismantled, or placed in circumstances that effectively deprive it of a capability. Either way, however, a structure's intrinsic *fitness* for a particular use can be determined on the basis of objective criteria.[9]

Using objective criteria to evaluate a structure's purpose or function is consistent with the principal cases discussed above (*Stewart*, *Evansville*, *Cope*, and *Roper*), in which the Court looked to the physical attributes and history of use of a dredge, a wharfboat, a drydock, and a deactivated ship used as a grain warehouse to determine whether they were practically capable of being used for maritime transportation. Those decisions did not endorse the proposition that a structure could be fit for navigation and yet held back from vessel status by the

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[9] The inquiry may be more difficult for watercraft that were once vessels but have arguably "los[t] their character as vessels," *Stewart*, 543 U.S. at 496, because there is necessarily a transition from one phase to another. Such structures will often retain some vessel-like characteristics even after they have reached the point of being "taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport." *Ibid.* Cf. *Chandris*, 515 U.S. at 374 ("At some point, * * * repairs become sufficiently significant that the vessel can no longer be considered in navigation."). Such a situation, however, is not presented here, where neither side contends that petitioner's home switched (in either direction) between vessel and non-vessel status.

owner's unwillingness to send it on a voyage.[10] Refusing to give dispositive weight to an owner's subjective intentions—when they are not adequately reflected in objective criteria—is consistent with the Court's recurring concern about having a "watercraft pass in and out of" vessel status. *Stewart*, 543 U.S. at 495; see also *id.* at 496 (contemplating that a change in status may be based on "extended periods of time" but not on "any given moment"); *Chandris*, 515 U.S. at 363. It is also less subject to manipulation in litigation and is more amenable to consistent application by regulatory agencies.

D. When A Floating Structure's Function Is To Remain Stationary Near The Shore, That Function Will Often Be Highly Probative Of Whether It Is Practically Capable Of Being Used For Maritime Transportation

Stewart reaffirmed the distinction between "fixed structures" (which are not vessels and "not commonly

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[10] The Fifth Circuit's decision in *De La Rosa* v. *St. Charles Gaming Co.*, 474 F.3d 185 (2006), which postdates *Stewart* and *Pavone*—arguably did endorse that proposition. The "boat[]" in that case had been "used as a seagoing vessel" before 2001 and "was still physically capable of sailing," but the court held that such use was "merely theoretical," because the boat had been "indefinitely moored" on Lake Charles for five years, it received utilities from land-based sources, and its owners' intent was "to use it solely as an indefinitely moored floating casino." *Id.* at 186-187. In *Tagliere* v. *Harrah's Illinois Corp.*, 445 F.3d 1012 (2006), the Seventh Circuit suggested that an owner's subjective intentions could determine whether a vessel was "permanently" or "indefinitely" moored, but it acknowledged that "[t]he difference between 'permanently' and 'indefinitely' in this context is vague" and would need to be "explor[ed] on remand." *Id.* at 1016.

As noted above (at pp. 16-17 & note 5), *Stewart* recognized that even a "semi-permanent" or "indefinite" mooring could prevent something from being a vessel, as very few moorings are so "permanent" that they could never be changed at some point in the future.

thought of as capable of being used for water transport") and vessels that are only "temporarily stationed in a particular location." 543 U.S. at 493, 494. The dredge in *Stewart* fell in the latter category. It operated away from shore and its mobility over water was essential to its purpose and function. Like any vessel in navigation, even when it was "moored to a dock," it "remain[ed] in readiness for another voyage," *Chandris*, 515 U.S. at 374 (quoting 2 Martin J. Norris, *The Law of Seamen* § 30.13, at 364 (4th ed. 1985)), during which it would again be used to "transport equipment and workers over water." *Stewart*, 543 U.S. at 495.

By contrast, the wharfboat in *Evansville* operated at a fixed place in the Ohio River. It performed its functions—as "an office, warehouse and wharf," 271 U.S. at 22—while remaining next to a dock. It did not need to be, and it was not, "taken from place to place" while performing those functions; its connections to land-based utilities "evidence[d] a permanent location"; and "[i]t did not encounter perils of navigation" while performing that function (even though it had been repeatedly towed, either to perform the same, stationary functions in another location, or to be repaired, or to be safe from ice). *Id.* at 20-22. The wharfboat was therefore not "*practically* capable of being used to transport people, freight, or cargo from place to place." *Stewart*, 543 U.S. at 493.

After *Stewart*, the Coast Guard—which has statutory obligations to conduct periodic inspections of many categories of vessels, including large passenger vessels, 46 U.S.C. 3301, 3307—established a policy to identify when "Craft Routinely Operated Dockside" are not "vessels" and therefore not subject to inspection. See 74 Fed. Reg. 21,814 (May 11, 2009). The Coast Guard had previously explained that there are sound policy reasons to treat

some waterborne structures—especially some used as permanently moored casinos—as being beyond the "parameters envisioned by vessel regulatory standards." 69 Fed. Reg. 34,385 (June 21, 2004). For example, passenger vessels are structured to give swift access to lifeboats (typically on upper decks) during emergencies. 46 C.F.R. 72.10-40. By contrast, occupants evacuating a land-based building normally attempt to escape through a street-level exit. Because gangways are generally better than lifeboats for evacuating a ship that is indefinitely moored, the Coast Guard explained that, for craft that are routinely operated dockside, "the structural fire protection standards related to means of escape, safe refuge and dimensions of spaces" associated with "shoreside structures" are more appropriate than those that apply to vessels that actually get underway and take passengers away from the shore. 69 Fed. Reg. at 34,385.

In its 2009 policy, the Coast Guard recognized that various factors bear on the question of whether a structure routinely operated dockside—*i.e.*, not at an offshore location—possesses "the practical * * * capability * * * to operate as a means of transportation on water." 74 Fed. Reg. at 21,815. It articulated the following, non-exclusive list of objective factors:

- Is the craft surrounded by a cofferdam, land or other structure, such that although floating, it is in a "moat" with no practical access to navigable water?
- Is the craft affixed to the shore by steel cables, I-beams or pilings, or coupled with land based utility connections for power, water, sewage and fuel?
- If the craft were operated in navigation, would it be thereby endangered because of its construction?

- What is the purpose, function, or mission of the craft?

- Can the craft get underway in less than eight (8) hours? If more than eight hours are required, the [relevant Coast Guard Officer in Charge of Marine Inspection] will determine if the delay was attributable to factors outside the owner's or operator's control, in which case the delay may be overlooked.

Ibid.[11]

By denying the relevance of virtually all of those factors, the court of appeals effectively erased the category of fixed structures that *Stewart* expressly excluded from "vessel[s]" under 1 U.S.C. 3.

E. This Case Should Be Remanded To Determine Whether Petitioner's Structure Was Practically Capable Of Being Used For Maritime Transportation

As this Court acknowledged in *Stewart*, whether a structure is a "vessel" is an inquiry that "may involve factual issues for the jury." 543 U.S. at 496 (citing *Chandris*, 515 U.S. at 373). Here, respondent bears the burden of proving that petitioner's structure was a "vessel," because it contends that fact gave the district court admiralty jurisdiction. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006). Because the vessel-status question was decided in respondent's favor at summary judgment, disputed questions of fact must be resolved in petitioner's favor. Fed. R. Civ. P. 56(a).

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[11] This Office has been informed by the Coast Guard that adopting the Eleventh Circuit's test on a nationwide basis would significantly increase the number of large passenger "vessels" that the Coast Guard would be required to inspect, diverting time and resources away from structures that are far more relevant to maritime safety and security.

Some evidence tends to support petitioner's contention that his floating home was not a vessel. At the time of its arrest, it had been continuously moored next to a dock in respondent's marina for three years, and it had left its previous dockside location in another marina only after that marina was destroyed by a hurricane. Pet. App. 3a. Like the wharfboat in *Evansville*, it had no motive power or steering, and it received some utilities (including electricity and water) from land. *Id.* at 18a; J.A. 31, 33. Over a period of several years, it was only rarely towed, and even then, there was some evidence that it could be towed only with great care, at very low speeds, in relatively calm waters. J.A. 75, 103-104. To the extent that its purpose or function was to serve as a floating residence, it appears to have been used that way only while adjacent to a dock and quite close to shore.

The district court, however, did not determine whether there were genuine disputes about many of the facts that, as discussed above, may be relevant to the vessel-status inquiry. To the contrary, the court acknowledged that petitioner (who was proceeding *pro se*) "places significance on the fact that moving the [d]efendant vessel may easily damage it," but the court dismissed that concern as irrelevant in light of circuit precedent focusing on whether a structure could be "mov[ed] over water, albeit to her detriment." Pet. App. 42a (quoting *Belle of Orleans*, 535 F.3d at 1312); see also Pet. Br. 5 n.6 (describing petitioner's offer to secure evidence that his home had previously been damaged when it was towed). The court also noted that its standard made evidence about the structure's "present use" irrelevant. Pet. App. 40a. Accordingly, there are no determinations (and little evidence) about the purpose or function of petitioner's floating home; about its design; or

about how suitable the structure was for being towed or for being used as a means of transporting people, freight, or cargo. The court of appeals criticized some of petitioner's contentions about the design of his home and the damage it had suffered as being unsupported by or contradicted by the record evidence, *id.* at 18a-19a, but it endorsed the district court's approach by treating those issues as irrelevant to its analysis.

If this Court concludes that the critical determination made by both of the lower courts—that petitioner's floating home had been towed significant distances—was insufficient to establish that the structure was a "vessel," it should vacate the judgment below and remand for further proceedings in light of the correct legal standard, rather than resolve in the first instance whether the record reflects any genuine disputes of material fact bearing on the vessel-status question, on which respondent bears the burden of proof.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 11-626

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN GAMING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Gaming Association (AGA) is a non-profit trade association whose members participate in the U.S. commercial gaming industry. AGA members include casino operators, manufacturers of gaming equipment, and entities providing services to the industry.

AGA members operate 61 state-licensed dockside casinos in six U.S. jurisdictions: Illinois, Indiana, Iowa, Louisiana, Mississippi, and Missouri. Those venues represent more than three-fourths of the dockside casinos in the nation. *See* Appendix A, *infra*. The majority of dockside gaming facilities are structures that previously operated as riverboats but are permanently moored to the shore and no longer travel over water. Many state licensing laws initially required that dockside casinos "cruise" on a river. By 2005, however, all six licensing states had abandoned the cruising requirement.[2] Today, most dockside casinos have been moored for many years. Some are surrounded by cofferdams and other fixed structures

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[1] The American Gaming Association hereby files this brief as *amicus curiae* in support of the Petitioner, in accordance with Rule 37.3 of the Supreme Court Rules. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* 230 Ill. Comp. Stat. Ann 10/11(1); Ind. Code §§ 4-33-6-21, -23, 4-33-9-2; 3 Iowa Code § 99f.1; La. Rev. Stat. Ann § 27:65(B)(1)(c); Miss. Code Ann. § 27-109-1(2)(c)(ii); Mo. Ann. Stat. § 313.805 (all eliminating the cruise requirement or authorizing gaming dockside or aboard permanently moored crafts or structures).

and float on water that is pumped around them; they are informally referred to as "boats in a moat."[3]

As is evident from the precedents cited in this case, legal disputes concerning dockside casinos frequently concern whether the facility should be deemed a "vessel" under federal maritime law. That determination often dictates whether state law or federal law applies to claims brought by casino employees seeking to invoke remedies under the federal Jones Act or the Longshore and Harbor Workers' Compensation Act,[4] as well as injury claims pressed by customers. By misreading this Court's ruling in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), the decision below injects confusion into the law and threatens an unwarranted expansion of the meaning of vessel under federal maritime law. Accordingly, the AGA and its members have a strong interest in the clarification of that law by this Court.

SUMMARY OF ARGUMENT

In *Stewart*, this Court insisted that the decision whether a floating structure is a vessel under federal maritime law, 1 U.S.C. § 3, is a practical one. In making that decision, a court should consider the historical use of the floating structure, its current situation, and its likely use going forward. The decision below ignored most of these practical

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[3] Christopher Brinckerhoff, *Des Plaines Casino is State's Third 'Boat-in-a-Moat'*, Des Plaines (IL) Patch, Oct. 23, 2010; Jerry Garrett, *French Lick Returns to Its Sin City Roots*, N.Y. Times, March 16, 2007.

[4] The Jones Act, 46 U.S.C. §§ 30104-30106 (2006); The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006).

considerations, substituting in their place the largely abstract question whether a structure located on water could be towed across water. To avoid an unwarranted expansion of the definition of vessel under federal law, this Court should enforce the practical, experience-based standard it articulated in *Stewart* and in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926).

This conclusion is reinforced by a review of the post-*Stewart* rulings on the question whether dockside casinos are vessels for federal maritime law purposes. State and federal courts, at both the trial and appellate levels, have largely agreed that under the practical criteria announced in *Stewart*, dockside casinos that have been moored for years are not vessels even if they theoretically might navigate over water or are registered with the Coast Guard. The Eleventh Circuit ruling would undermine this consensus.

In addition, the decision below is inconsistent with the purposes of federal maritime statutes and admiralty jurisdiction, extending the legal protections in them to permanently-moored structures that do not experience the risks that justify those protections. In addition, federalism considerations – which are particularly strong in the context of the state-authorized and state-regulated gaming industry – also caution against the broad ouster of state law through an unduly expansive construction of the meaning of vessel.

ARGUMENT

I. *STEWART V. DUTRA CONSTRUCTION CO.* ANNOUNCED A PRACTICAL, EXPERIENCE-BASED DEFINITION OF "VESSEL" UNDER SECTION 3

The definition of vessel in Section 3 of the United States Code seems an unlikely source of contemporary disagreement among the courts. The provision, first enacted in 1873, has never been materially amended[5]; moreover, it applies to an activity (maritime transportation) that has seen no technological innovations of particular relevance to the definition. Cases construing the statute from a century ago address many types of floating structures and converted vessels that are still in use.[6] Nevertheless, the Eleventh Circuit's decision in this case marks a significant departure from the prevailing law as explained in *Stewart*.

The statute provides that "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Neither the floating structure occupied by Mr. Lozman nor most of the dockside casinos operated by AGA members is in any sense being "used, as a means of transportation on water." *Id.* Quite simply, those structures have not moved over water in years. The question on which the court below went astray,

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[5] *See Stewart*, 543 U.S.481, 489-90 (the statute "has remained virtually unchanged from 1873 to the present").

[6] *See, e.g., Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 630 (1887) (holding that a drydock was not a vessel); *The Alabama*, 19 F. 544, 546 (S.D. Ala. 1884) (dredge was a vessel); *Evansville & Bowling Green*, 271 U.S. at 22 (wharfboat not a vessel).

however, is whether the structure is "capable of being used" as a means of water transportation. *Id.*

In *Stewart*, this Court made plain that this broad statutory language should not be construed to reach every item that floats when set upon water. The Court stressed that a structure, even one that floats, is not a vessel if it has been "taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport." 543 U.S. at 496. This caution thus excludes from vessel status those structures that may once have been vessels but have been withdrawn from navigation. *Id.*

To determine when a structure has been withdrawn from navigation, *Stewart* pointed to the importance of experience. The definition of vessel, the Court wrote, "would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport." *Id.* at 494. Thus, although a plastic milk container or a plywood sheet might be "capable of being used" for transporting items over water, they are not commonly thought of in that way, are not vessels as a practical matter, and are not vessels under federal maritime law.

Stewart discussed with approval this Court's decision in *Evansville & Bowling Green*, which underscores the importance of the experience with the structure at issue. *Evansville & Bowling Green* held that a permanently-moored wharfboat was not a vessel under Section 3. 271 U.S. at 22. After decades of service as a boat, that craft sat year after

year in the Ohio River at Evansville, Indiana.[7] It was secured to the shore by four or five cables, plus utility connections for water and electricity, and no longer had an engine aboard. Shippers stored goods on the wharfboat and then transferred those goods to passing steamboats. The wharfboat was moved occasionally, the Court wrote, "to conform to the stage of the river," and was towed every winter to Green River harbor to avoid ice. *Id.* at 19-21. Holding that the wharfboat was not a vessel under federal maritime law, this Court emphasized what the wharfboat did *not* do (*id.* at 22):

> It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

Significantly, the wharfboat in *Evansville & Bowling Green* was not a vessel even though it was moved over water at least twice a year in response to river ice, and at other times to adjust to stages of the river. In those respects, the wharfboat closely resembled Mr. Lozman's floating structure and many of the dockside casinos operated by AGA members. Although the wharfboat was theoretically capable of water transportation, it very rarely was moved over water. Consequently, the Court concluded and *Stewart* affirmed, it neither practically functioned as a vessel nor was "commonly thought of as capable of being used for water transport." 543 U.S. at 494. In

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[7] The wharfboat was moored not far from where a dockside casino is now permanently moored.

contrast, the dredge at issue in *Stewart* was in use precisely because it could be moved through Boston Harbor and dredge the future path of a tunnel.

The Eleventh Circuit paid insufficient attention to these practical factors in its ruling. That court effectively reduced to one the factors it would consider in deciding whether a structure is a vessel under federal maritime law: Is the structure "practically capable of transportation over water by means of a tow"? Pet. App. 17a. If the answer to that question is "yes," the Eleventh Circuit held, the structure is a vessel. *Id.* This definitional standard risks expanding the definition of vessel beyond recognition. Virtually any item that is airtight or floats can be towed over water. Are all to be vessels under federal law?

Moreover, the Eleventh Circuit's expansive definition of vessel ignores the practical considerations this Court has previously found relevant. The court below did not consider whether the structure was "commonly thought of" as a vessel. The court also did not address whether the structure had been withdrawn from navigation, or whether the history of the structure indicated that "as a practical matter" it was not a vessel despite a "remote possibility that [it] may one day sail again." *Stewart*, 543 U.S. at 494, 496. Nor did the court concern itself with whether Mr. Lozman's residence performed a function that might equally be performed by a similar structure on land.

Instead, the court of appeals flatly rejected any consideration of the "purpose" of the owner of a structure, Pet. App. 16a, thereby excluding from its

consideration the recent and not-so-recent history of the structure. Yet that history is exactly what courts should consider in deciding whether it is a theoretical or practical possibility for a structure to serve as a vessel. *Stewart* stressed that the decision on vessel status will turn on "practical" considerations which necessarily include the current use of the structure, the previous use of the structure, and the use that reasonably may be expected going forward. 543 U.S. at 496. Those considerations, not an appellate court's guess whether a structure might successfully be towed over water, should control the application of federal maritime law. Because the Eleventh Circuit's decision excludes so many relevant factors from the determination of vessel status and departs from the standard explained in *Stewart*, it should be reversed.

II. DOCKSIDE CASINOS ARE RARELY VESSELS UNDER FEDERAL MARITIME LAW

The error of the decision below can be illustrated by reviewing the eleven federal and state rulings that have decided, since *Stewart* was announced in 2005, whether dockside casinos are vessels under federal maritime law. No court other than the Eleventh Circuit has misapplied *Stewart* by so emphasizing the bare theoretical possibility that a structure could be towed over water. In two of the eleven cases, the courts concluded that the dockside casino might be deemed a vessel, but all of the courts other than the Eleventh Circuit examined the factors set forth in *Stewart* and *Evansville & Bowling Green*, especially whether experience with the structure showed that use of the dockside casino as a

means of transportation was merely a theoretical possibility rather than a practical one.

In most of those decisions, the dockside casinos initially were constructed as watercraft; in many instances, the dockside casinos retained navigation systems and engines; some held Coast Guard certificates of inspection. Even though the structures still floated on water, almost all were found to have been withdrawn from navigation and thus to fall within *Stewart*'s teaching that "ships taken permanently out of the water *as a practical matter* do not remain vessels merely because of the remote possibility that they may one day sail again." 543 U.S. at 494 (emphasis added).

(i) *Breaux v. St. Charles Gaming Co.*, 68 So. 3d 684 (La. App. 3d Cir. 2011), *cert. denied*, 71 So. 3d 322 (2011): An intoxicated customer suffered injuries in a 4 a.m. fall on a stairway. In order to avoid Louisiana's dram shop statute, which would have denied her a cause of action, she argued that the dockside casino was a vessel and thus she could sue under federal maritime law. The state court denied that the casino was a vessel, even though the structure had a maritime crew and "the equipment necessary for navigation," stressing that it had conducted no cruises for seven years. *Id.* at 686.

(ii) *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006): The U.S. Court of Appeals for the Fifth Circuit rejected a claim by another customer who fell in the same facility, the *Crown Casino*. Emphasizing that the dockside casino had not been used as a seagoing

vessel for more than five years, the court found it was not a vessel even though "physically capable of sailing," because "[i]ts operations are entirely gaming-related, and not maritime in nature." *Id.* at 187.

(iii) *Bourgeois v. Boomtown, L.L.C.,* No. 09-C-243, 2009 WL 5909119 (La. App. 5th Cir. May, 21, 2009): This plaintiff also hoped to avoid a state dram shop statute by suing under federal law. Citing *Stewart,* the state court stressed that state law *required* that the facility be permanently docked in order to maintain its casino license. *Id.* at *2. The structure, which had not left its dock for eight years, was found not to be a vessel. *Id.*

(iv) *Wire v. Showboat Marina Casino Partnership,* No. 06C6139, 2008 WL 818310 (N.D. Ill. Mar. 20, 2008): An employee sought damages under the federal Jones Act for work-related injuries, claiming the dockside casino was a vessel. The trial court rejected the argument, noting that the riverboat had not left dockside for six years even though it still had diesel engines and propellers which were started up in foul weather to stabilize the structure. *Id.* at *7.

(v) *RDI/Caesars Riverboat Casino, Inc. v. Conder,* 896 N.E.2d 1172 (Ind. Ct. App. 2008): A table games dealer sought to sue a dockside casino under the Jones Act, claiming she suffered a heart attack following an allergic reaction to medicine that was administered to treat flea bites she suffered at work. Although the facility

was registered with and inspected by the Coast Guard, the state appeals court found that it had not left its dock for six years and could navigate only in emergency situations.[8] Accordingly, the court denied that it was a vessel under federal law. *Id.* at 1181.

(vi) *Ford v. Argosy Casino Lawrenceburg,* No. 4:04cv0017-DFH-WGH, 2008 WL 817113 (S.D. Ind. Mar. 24, 2008): A slot machine technician on the *Argosy VI* sought to recover under the federal Jones Act on a claim for work-related injuries. Although the dockside casino employed a full maritime crew and was regularly inspected by and registered with the Coast Guard, it had not left dockside for six years. Applying this Court's holding in *Stewart,* the trial court ruled that the operation of the *Argosy VI* as a vessel was not a "practical possibility" but only a theoretical one. *Id.* at *5.

(vii) *Earls v. Belterra Resort, Indiana, LLC,* 439 F. Supp. 2d 884 (S.D. Ind. 2006): Another dockside casino employee pressed an injury claim under the Jones Act, although the riverboat (the *Miss Belterra*) had not cruised for four years.

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[8] Petitioner suggests that the Eleventh Circuit's interpretation of Section 3 in this case would require direct regulation of a variety of floating structures as vessels by the Coast Guard and the Occupational Health and Safety Administration. Br. for Pet. 43-44. We are not so certain. Those agencies have their own regulatory and safety concerns in determining to inspect and register a floating structure, and those concerns are not the same as those that control vessel status under Section 3; indeed, as described in the text above, several courts have concluded that a dockside casino that was regulated by the Coast Guard was not a vessel under Section 3.

The *Miss Belterra* had a valid Coast Guard Certificate of Inspection, a full-time maritime crew of ten hands, and functioning engines and navigation system. The Coast Guard conducted propulsion tests on the engines twice a year though the structure did not leave the dock during the tests. The *Miss Belterra*, the trial court held, was not a vessel because there was "only a remote possibility it will sail again." *Id.* at 890.

(viii) *In re Silver Slipper Casino Venture LLC*, No. 07-60330, 2008 WL 276072 (5th Cir. Jan. 31, 2008): The owners of the *Silver Slipper* claimed the dockside casino was a vessel and thus they had no liability for damages caused when Hurricane Katrina tore it from its pilings, carried it several thousand feet across a highway, and smashed it into a hotel. The appeals court held that the "permanently-moored" casino was not a vessel under federal law, observing: "[T]he unfortunate fact that Hurricane Katrina blew the casino across a highway and into a hotel did not suddenly transform a non-vessel into a practically navigable watercraft." *Id.* at *2.

Two post-*Stewart* cases have found that dockside casinos were vessels, but each involved special circumstances. In *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141 (Ill. App. Ct. 2006), the *Alton Belle* not only had a full maritime crew and navigational equipment, but also "left its mooring for dedrifting approximately five times per year," a process that involved spinning the boat "two or three times to dislodge any accumulated drift materials." *Id.* at

142-43. Because it thus sailed with some regularity, it was found to be a vessel. In contrast, the Eleventh Circuit's ruling in *Bd. of Comm'rs of Orleans Levee Dist. v. M/V Belle of Orleans,* applied the erroneously broad and impractical definition of vessel which also appeared in the decision below.[9] 535 F.3d 1299, 1309 (11th Cir. 2008) (citing *Stewart,* 543 U.S. at 496).

A final ruling, *Tagliere v. Harrah's Illinois Corp.,* 445 F.3d 1012 (7th Cir. 2006) (Posner, J.), was less than definitive. A customer sued for injuries suffered while playing a slot machine; she was leaning against a stool that collapsed. In a somewhat idiosyncratic analysis, the court of appeals asked whether the dockside casino should be characterized as the equivalent of "landfill" and questioned the potential impact on the claim of differing federal and state standards for damages, limitations periods, and the required duty of care. *Id.* at 1015-16. The court

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[9] In both *Belle of Orleans* and in the ruling below, the court of appeals misconstrued the decision in *Pleason v. Gulfport Shipbuilding Co.,* 221 F.2d 621 (5th Cir. 1955), which does not support either decision of the Eleventh Circuit. In *Pleason,* a vessel sank offshore Belize in 1951. After salvage, it was towed to Orange, Texas for repairs. *After* those repairs were completed, the vessel was towed on to Port Isabel, Texas. In Port Isabel, it was permanently moored for use as a shrimp processing plant. When those who performed the repairs in Orange sued to assert a maritime lien against the vessel, the courts correctly applied federal maritime law, because the lien was based on events that occurred *before* the vessel was permanently moored in Port Isabel. *Id.* at 623. That is, when the vessel was in Orange for repairs, it was still functioning as a means of water transportation. *Id.* The Eleventh Circuit has now twice relied on *Pleason* without recognizing this key fact. *Pleason* thus has no direct application to cases like this one, or to most cases concerning dockside casinos, which involve claims arising on permanently-moored facilities.

concluded that the record did not support the trial court's finding that the dockside casino, which had not left its mooring for two years, was not a vessel. *Id.* But the appellate court remanded the case and invited the casino owner to present additional evidence under a standard that does not derive from this Court's ruling in *Stewart*: Whether the dockside casino was "permanently rather than merely indefinitely moored when the accident occurred." *Id.* *Tagliere*'s distinction between a "permanent" mooring and an "indefinite" one seems an extremely fine one that could lead to endless wrangling in the courts. Moreover, it has no basis in the decisions of this Court.

This survey of post-*Stewart* rulings by federal and state courts indicates that a general consensus has formed on whether dockside casinos are vessels under federal law. If those structures have been withdrawn from navigation so that they lose their maritime purpose and character, they are no longer vessels in the practical sense articulated by *Stewart*. The ruling below, if allowed to stand, would undermine that consensus and this Court's ruling in *Stewart*.

III. THE DECISION BELOW IS CONTRARY TO THE POLICIES OF FEDERAL MARITIME LAW AND THE INTERESTS OF FEDERALISM

A principal purpose of federal maritime law is to support and facilitate marine commerce. *See Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990). To that end, Congress enacted both the Jones Act and the Longshore and Harbor Workers' Compensation Act to provide more effective and predictable legal

remedies for seamen and harbor workers than were otherwise available. *See Chandris, Inc. v. Latsis*, 515 US 347, 354-56 (1995). Congress acted to protect those workers because of "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *McDermott Int'l v. Wilander*, 498 U.S. 337, 354 (1991). These are not risks confronted, however, by those who go down to the permanently-moored dockside casino to deal blackjack or repair slot machines. In deciding whether a dockside casino was a vessel, none of the post-*Stewart* decisions involved an injury caused by the dangers of the briny deep: wind, weather, tides, or remoteness from land. Two concerned hurricane damage of a sort faced by all waterfront structures, while the rest involved decidedly terrestrial risks such as fleas, inebriation, and defective furniture.

The Eleventh Circuit decision in this case, if endorsed by this Court, could substantially transform the legal environment in which dockside casinos operate, subjecting them to federal maritime remedies for events which have no maritime character and should not be subject to admiralty jurisdiction. That result would not only distort the policies that animate federal maritime law, but also would inappropriately extend that law over disputes that are adequately addressed by state negligence and liability law. This federalism concern has particular resonance when dealing with the commercial casino industry, which is almost entirely a creature of state law.

For many decades, state and local governments have exercised nearly exclusive control over legalized gambling in their communities. Individual states

can legalize commercial gambling in those venues, and on those terms, that are consistent with the attitudes and preferences of the community. Only six states, for example, have chosen to authorize dockside casinos, and they have created extensive regulatory structures to ensure that casinos are operated fairly. This Court should be wary of any step that might weaken the traditional role of the states in licensing, regulating, and supervising the gaming business.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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May 2012

APPENDIX

APPENDIX A

A Survey of Dockside Casinos in the U.S.

ILLINOIS

Riverboat Name	Parent Company	Location
Harrah's Metropolis Casino	Caesars Ent.	Metropolis, IL
Casino Queen	Casino Queen, Inc.	East St. Louis, IL
Alton Belle Casino	Penn National Gaming Inc.	Alton, IL
Jumer's Casino	Delaware North Companies	Rock Island, IL
Par-A-Dice Casino	Boyd Gaming Co.	East Peoria, IL
Hollywood Casino Joliet	Penn National Gaming Inc.	Joliet, IL
Harrah's Joliet Casino	Caesars Ent.	Joliet, IL
Hollywood Casino Aurora	Penn National Gaming	Aurora, IL
Grand Victoria Casino	Hyatt	Elgin, IL
Rivers Casino	Midwest Gaming and Entertainment	Des Plaines, IL

INDIANA

Riverboat Name	Parent Company	Location
Ameristar Casino	Ameristar	East Chicago, IN
Belterra Casino	Pinnacle Entertainment	Belterra, IN
Blue Chip Casino	Boyd Gaming Corp.	Michigan City, IN
Casino Aztar	Tropicana Entertainment	Evansville, IN
Grand Victoria Casino	Hyatt	Rising Sun, IN
Hollywood Casino	Penn National Gaming	Lawrenceburg, IN
Horseshoe Casino Hammond	Caesars Ent.	Hammond, IN
Horseshoe Southern Indiana	Caesars Ent.	Elizabeth, IN
Majestic Star Casino I	Majestic Star Casino, LLC	Gary, IN
Majestic Star Casino II	Majestic Star Casino, LLC	Gary, IN

IOWA

Riverboat Name	Parent Company	Location
Argosy Casino	Penn National	Sioux City, IA
Harrah's Council Bluffs	Caesars Entertainment	Council Bluffs, IA

Ameristar Casino Hotel Council Bluffs	Ameristar	Council Bluffs, IA
Lakeside Hotel Casino	Affinity Gaming	Osceola, IA
Rhythm City Casino	Isle of Capri	Davenport, IA
Isle of Capri Bettendorf	Isle of Capri	Bettendorf, IA
Lady Luck Casino	Isle of Capri	Marquette, IA

LOUISIANA

Riverboat Name	Parent Company	Location
Diamond Jacks	Legends Gaming	Bossier City, LA
Sam's Town	Boyd Gaming	Shreveport, LA
Horseshoe	Horseshoe Entertainment	Bossier City, LA
Boomtown Casino (Westbank)	Pinnacle Entertainment	Harvey, LA
Belle of Baton Rouge	Tropicana Entertainment	Baton Rouge, LA
Treasure Chest	Boyd Gaming	Kenner, LA
Hollywood Casino	Penn National	Baton Rouge, LA
Amelia Belle	Amelia Belle	Amelia, LA

Isle of Capri (St. Charles)	Isle of Capri Casinos	Westlake, LA
Isle of Capri (Grand Palais)	Isle of Capri Casinos	Westlake, LA
Boomtown Casino (Bossier)	Pinnacle Entertainment	Bossier City, LA
El Dorado Resort	Eldorado	Shreveport, LA
L'Auberge du Lac	Pinnacle Entertainment	Lake Charles, LA

MISSISSIPPI

Riverboat Name	Parent Company	Location
Ameristar Casino	Ameristar Casinos	Vicksburg, MS
Bally's Saloon	Park Place Ent.	Robinsville, MS
Bayou Caddy Jubilee Casino	Bayou Caddy Casino	Greenville, MS
Beau Rivage Resort	MGM Mirage	Biloxi, MS
Boomtown Casino Biloxi	Penn National Gaming, Inc.	Biloxi, MS
Casino Magic Bay St. Louis	Penn National Gaming, Inc.	Bay St. Louis, MS
Casino Magic Biloxi	Pinnacle Entertainment, Inc.	Biloxi, MS
Copa Casino	*Privately Held*	Gulfport, MS
Fitzgeralds Casino	Majestic Star Casino, LLC	Robinsville, MS

Gold Strike Casino Resort	Mandalay Resort Group	Robinsville, MS
Grand Casino Tunica	Park Place Ent.	Robinsville, MS
Grand Casino Biloxi	Park Place Ent.	Biloxi, MS
Grand Casino Gulfport	Park Place Ent.	Gulfport, MS
Harrah's Tunica Casino	Harrah's Ent.	Robinsville, MS
Harrah's Vicksburg	Harrah's Ent.	Vicksburg, MS
Hollywood Casino Resort	Hollywood Casino Corp.	Robinsville, MS
Horseshoe Casino	Horseshoe Gaming Co.	Robinsville, MS
Imperial Palace	Imperial Palace	Biloxi, MS
Isle of Capri Casino	Isle of Capri	Biloxi, MS
Isle of Capri Casino	Isle of Capri	Vicksburg, MS
Isle of Capri Casino	Isle of Capri	Lula, MS
Isle of Capri Casino	Isle of Capri	Natchez, MS
Lighthouse Point Casino	*Privately Held*	Greenville, MS
The New Palace Casino	*Privately Held*	Biloxi, MS
President Casino	President Casinos Inc	Biloxi, MS
Rainbow Casino	Alliance Gaming Co.	Vicksburg, MS

Sam's Town Hotel	Boyd Gaming Corp.	Robinsville, MS
Sheraton Casino	Park Place Ent.	Robinsville, MS
Treasure Bay	*Privately Held*	Biloxi, MS

MISSOURI

Riverboat Name	Parent Company	Location
Ameristar-St. Charles	Ameristar	St. Charles, MO
Ameristar-Kansas City	Ameristar	Kansas City, MO
Argosy Casino	Penn National	Riverside, MO
Harrah's Casino-Kansas City	Caesars	North Kansas City, MO
Harrah's Casino-St. Louis	Caesars	Maryland Heights, MO
Isle of Capri-Boonville	Isle of Capri	Boonville, MO
Isle of Capri-Kansas City	Isle of Capri	Kansas City, MO
Lady Luck Casino	Isle of Capri	Caruthersville, MO
Lumiere Place	Pinnacle	St. Louis, MO
River City Casino	Pinnacle	St. Louis, MO
Terribles Casino-LaGrange	Affinity Gaming	La Grange, MO
Terribles Casino-St. Joseph	Affinity Gaming	St. Joseph, MO

AMICUS CURIAE BRIEF

No. 11-626

In The
Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Kevin M. Clermont, is the Ziff Professor of Law at Cornell Law School, where he has taught since 1974. He received his J.D. from Harvard and his A.B. from Princeton University. He teaches and writes in the field of federal civil procedure. He is the author of numerous articles on civil procedure, as well as multiple books including *Principles of Civil Procedure* (3d ed. 2012) and *Materials for a Basic Course in Civil Procedure* (10th ed. 2010) (with Richard H. Field and Benjamin Kaplan).

As a scholar and commentator in the field, *amicus* has a neutral perspective on the procedural aspects of determining subject-matter jurisdiction, and an interest in maintaining a sensible and consistent interpretation of the governing law. He has no interest in the outcome of this litigation except as it pertains to these concerns. Indeed, the views expressed in this brief all predate this litigation, having been expressed in Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973 (2006). In the context of this case, those views inevitably imply that the district court in this litigation possessed subject-matter jurisdiction.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus* and his counsel, has made a monetary contribution to the preparation or submission of this brief.

This case has particularly aroused the concerns of *amicus*, because none of the briefs in support of the petitioner has recognized that the jurisdictional question of vessel-hood differs from the overlapping merits question. The Solicitor General's brief comes closest by actually referring to a standard of decision for subject-matter jurisdiction, but then cursorily implies that the jurisdictional question should be determined as an ordinary question of fact. *See* Amicus Br. for U.S. 29. However, overlapping jurisdictional and merits issues require special attention, as explained in this brief.

SUMMARY OF ARGUMENT

This case is all about whether the petitioner's houseboat is a "vessel." Respondent-plaintiff City said it was, entitling the City to admiralty jurisdiction and to victory. That is, the status as "vessel" was critical to both the jurisdiction and the merits. Petitioner Lozman insisted that his home was not a "vessel." The contest continued. But at this stage in this Court, any ongoing contest over vessel-hood would concern only the merits. The district court clearly possessed subject-matter jurisdiction.

The reason for clear jurisdiction lies in the standard of decision. When a fact essential to jurisdiction is also a fact entailed in the merits, the showing required to establish jurisdiction is merely one that meets a prima facie standard. That is, the party

arguing for jurisdiction need show only some sort of a reasonable likelihood of the fact's existence. The court can then proceed to the merits, at which stage the fact's existence for the purposes of the merits would be subject to the ordinary standard of decision.

So here, the City could establish subject-matter jurisdiction merely by showing that the houseboat was reasonably likely a "vessel." Whether it actually was a "vessel" is an issue that arose only on the merits.

ARGUMENT

I. In Deciding Subject-Matter Jurisdiction, the Applicability of a Prima Facie Standard for Issues That Overlap the Merits Is Well Established.

The usual standard of decision covering jurisdictional disputes is clear. Proof here is usually an ordinary task, subject to the ordinary standard of decision. The ordinary standard of decision in a civil case – our default rule – is preponderance of the evidence, because it serves the neutral policy of error-minimization. On the typical factual element or legal question of jurisdiction whenever properly challenged, then, the proponent of jurisdiction must make a showing of more likely than not.

This nice clear rule, however, is subject to one exception: if that element or question overlaps the

merits of the claim, the proponent need provide only prima facie proof to establish the forum's authority.

A. The Prima Facie Standard Stands as an Exception to the Usual Standard of Decision.

When an element or question overlaps the merits of the claim, the proponent must establish a prima facie case, that is, some sort of reasonable likelihood that the overlapping jurisdictional proposition prevails. That less demanding standard will allow the judge to decide efficiently but definitively whether the forum has authority to decide the merits – doing so without entailing or foreclosing any decision on the merits, a decision to which a higher standard would apply.

This prima facie standard applies to the jurisdictional issue regardless of the procedural setting in which it arises. The same standard applies before, during, and after trial. *See* Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. at 984-86, 992-96.

The prima facie standard applies to all jurisdictional issues, whether they are questions of law or fact or are mixed questions. *See id.* at 1000-04. "Simply put, for the purposes of required showing, no momentous distinction lies between fact and law; they are epistemological equivalents." *Id.* at 1001.

This prima facie standard applies to all the various types of jurisdiction. Admittedly, most of the

cases and discussion involve personal jurisdiction. Modern long-arm statutes have made overlapping jurisdictional issues commonplace. Courts have readily concluded from the beginning that the plaintiff need not prove that the defendant committed a tort in order to show for personal jurisdiction that the action arose from the in-state commission of a tort. *See*, *e.g.*, *Nelson v. Miller*, 143 N.E.2d 673, 680-81 (Ill. 1957).

The prima facie standard applies to all the other threshold issues that go to the forum's authority. Thus, the same considerations apply to nonpersonal jurisdiction of either the in rem or the quasi in rem variety. If the jurisdiction and the merits overlap as to an issue, then a lower standard should apply to that jurisdictional issue. *See Florida, Department of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1345-46 (5th Cir. 1980) (applying a lower standard to ownership in the unusual situation where deciding who owns the thing determines whether in rem jurisdiction exists), *rev'd on other grounds*, 458 U.S. 670 (1982).

B. The Prima Facie Standard Applies to Subject-Matter Jurisdiction Issues That Overlap the Merits.

Most importantly for present purposes, the prima facie standard applies to subject-matter jurisdiction. *See* Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. at 1006-20. Indeed, a lower standard of decision on some such issues is second nature to the courts.

The well-known legal-certainty test for jurisdictional amount is actually a prima facie standard of decision. *See id.* at 1008-11 (citing *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938)). The so-called substantiality rule for jurisdiction, under which the basis of a federal-question claim need be meritorious only to a reasonable possibility, is more obviously a prima facie standard of decision. *See id.* at 1011-13 (citing *Bell v. Hood*, 327 U.S. 678 (1946)).

The leading case for the prima facie standard being more generally applicable to subject-matter jurisdiction is *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-38 (1995) (saying that for admiralty jurisdiction the maritime activity must have proximately caused the damage on land, in a case where the district court had dismissed for lack of subject-matter jurisdiction). It blessed the propriety of adjusting downward the standard of decision when the jurisdiction and the merits overlap:

> The city responds by saying that, as a practical matter, the use of proximate cause as a limiting jurisdictional principle would undesirably force an admiralty court to investigate the merits of the dispute at the outset of a case when it determined jurisdiction. The argument, of course, assumes that the truth of jurisdictional allegations must always be determined with finality at the threshold of litigation, but that assumption is erroneous. Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion

> of jurisdictional elements, *see, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Bell v. Hood*, 327 U.S. 678, 682-683 (1946), and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection).

Id. (footnote omitted).

More recently, in *Osborn v. Haley*, 549 U.S. 225 (2007), this Court distinguished the standard of decision for removal facts from the standard for merits facts where they overlap. The overlapping issue there was whether a federal employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* at 233.

That statutory language from the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, has generated the neatest example for elaborating how the prima facie standard applies to subject-matter jurisdiction. Take *Montez v. Department of Navy*, 392 F.3d 147 (5th Cir. 2004), as a prime illustration.

The plaintiffs in *Montez* sued the government for the wrongful death of their daughter in a car accident, when she had been a passenger in the Navy's car driven by a sailor. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, holding that the FTCA did not apply to the complaint against

the Navy because the sailor was not "acting within the scope of his office or employment" at the time of the accident. The appellate court reversed, holding that the district court should not have resolved disputed facts dispositive of both the subject-matter jurisdiction and the merits of an FTCA claim on a 12(b)(1) motion. It explained:

> In general, where subject matter jurisdiction is being challenged, the trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case. . . .
>
> However, where issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits. In circumstances where "the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case" under either Rule 12(b)(6) or Rule 56.

Id. at 149-50 (second omission in original) (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.) ("Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits."), *cert. denied*, 454 U.S. 897 (1981)); *see*

Cody C. Bailey, Comment, *All Wound Up: Unraveling the Application of FRCP 12(b)(1) Versus FRCP 56 Under the Federal Tort Claims Act*, 79 Miss. L.J. 757 (2010) (approving the *Montez* decision).

Some subsequent cases have objected to *Montez*'s tone of "assuming" jurisdiction. *E.g.*, *Edinburgh v. American Security Insurance Co.*, Civ. No. 10-613, 2010 WL 3923292, at *6 n.4 (E.D. La. Sept. 28, 2010). So, other cases have tightened up their language. *E.g.*, *CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008) (clarifying that it merely was "requiring less of a factual showing [in the way of jurisdictional proof] than would be required to succeed at trial"); *see* Erin Murray Watkins, Comment, *The Scope of Employment Requirement of the Federal Tort Claims Act: The Impropriety and Implications of the* Montez *Decision, and the Superior Jurisdictional Prima Facie Approach*, 17 Geo. Mason L. Rev. 533, 549 (2010) ("As a preponderance of the evidence would be necessary to succeed at trial, at the jurisdictional stage the court should require a prima facie showing that the tortfeasor was acting in the scope of his employment in order for the plaintiff to survive the 12(b)(1) motion to dismiss. This approach would promote efficient resolution of the jurisdictional question while not prematurely rendering a decision on the merits." (footnotes omitted)).

Most recently, on facts very similar to *Montez*, an appellate court got downright precise on the meaning of "prima facie." In *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009) (overturning a dismissal for lack

of subject-matter jurisdiction),[2] the court of appeals specified:

> Because the scope-of-employment issue is determinative of both jurisdiction and the underlying merits of an FTCA claim, dismissal under Rule 12(b)(1) is inappropriate unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.

Id. at 195 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)); *accord Lawrence v. Dunbar*, 919 F.2d 1525, 1530 & n.7 (11th Cir. 1990) ("Where the plaintiff's claims are 'clearly immaterial, made solely for the purpose of obtaining jurisdiction or are wholly unsubstantiated and frivolous,' the court should dismiss the claim." (quoting *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 734 (11th Cir. 1982))); *cf. Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (testing whether the defendant was an "employer" under ADEA under the subject-matter jurisdiction standard of whether the plaintiff's position is clearly immaterial or insubstantial).

---

[2] Clearly demonstrating the difference in standards of decision, the district court on remand exercised subject-matter jurisdiction but decided on the merits for the defendant on the ground that the employee was not acting within the scope of employment. The Fourth Circuit then affirmed. *Kerns v. United States*, Civ. No. CCB-07-1006, 2011 WL 1230360 (D. Md. Mar. 28, 2011), *aff'd*, No. 11-1350, 2012 WL 1372124 (4th Cir. Apr. 20, 2012).

In sum, the law certainly calls for applying the prima facie standard to any issue of subject-matter jurisdiction that also will arise on the merits.

II. In Deciding Subject-Matter Jurisdiction, Applying a Prima Facie Standard Is Well Justified.

What showing, then, should the jurisdictional proponent have to make in order to establish challenged jurisdiction? The proponent must do more than *allege* the jurisdictional prerequisites, because that would make jurisdictional testing into a farce. But the proponent should not have to *prove* the merits in order to establish jurisdiction, because that standard would have all sorts of obviously illogical consequences, elaborated below.

The answer, therefore, must lie in requiring the jurisdictional proponent to show the court something between mere allegation and full proof: hence, the prima facie standard of decision. The courts have supported that standard with five strong reasons.

A. Five Reasons Support Applying the Prima Facie Standard to Overlapping Subject-Matter Jurisdiction Issues.

First, requiring full proof would necessitate a preliminary hearing on jurisdiction, which would entail an inefficiently delayed and wasteful full-dress minitrial on at least part of the merits. If the opponent

were to win that hearing, he or she would get not a conclusive judgment on the merits but only a dismissal for lack of jurisdiction. If the opponent instead were to lose, he or she might or might not be foreclosed from later relitigating the point. The prima facie standard causes these significant oddities and hesitancies to melt away. The lower standard permits a simplified and streamlined threshold procedure on motions to dismiss, which can decide jurisdiction without dragging in the case's merits completely. This procedure avoids the waste and other impracticalities of a full-dress preliminary hearing that would really be a trial, as well as the unfairness of a party's obtaining only a jurisdictional decision for what was really a victory on the merits.

Second, the authorities tend to equivocate on whether, in a common-law-type action, a jury must pass on overlapping jurisdictional facts. *See* Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. at 990-91. However, any need to empanel a jury for a jurisdictional challenge would disappear upon recognizing the difference in the standards of proof on jurisdictional and merits issues. Whether a fact exists to a prima facie degree is a different issue from whether the fact exists to a preponderance. So, even when there is a jurisdictional challenge that involves facts also involved in the merits of the claim, the judge should be able to decide the jurisdictional challenge on his or her own and at the outset of the action. That is, the judge can decide jurisdiction without the intervention of a jury – and without concern of stepping on

any jury right. *See Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 55 (D. Mass. 1987).

Third, the obvious res judicata and law of the case problems dissipate under a regime of prima facie proof. If a court were to determine an issue by a preponderance in deciding jurisdiction, and that issue is common to the merits, there could be unexpected and undesirable preclusive effects on those merits. Lowering the standard of decision is the ready cure. An affirmative finding on contested jurisdictional issues by a prima facie standard will not affect the merits, because issues found by a lower standard of decision will not preclude issues governed by a higher standard of decision – although a finding of jurisdiction will preclude later relief from judgment for lack of jurisdiction, by the ordinary operation of the jurisdiction to determine jurisdiction doctrine. Alternatively, under existing law, a finding of no jurisdiction does not produce a valid judgment and so should not be binding in another action – except to defeat jurisdiction in any attempt to sue again in a court where the same jurisdictional issue arises. *See* Kevin M. Clermont, *Sequencing the Issues for Judicial Decision-making: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 Fla. L. Rev. 301, 318-21 (2011). The resulting desirable rule – that a jurisdictional finding will not carry over to the merits – derives from the standard of decision's breaking the identity between jurisdictional issues and those on the merits.

Fourth, the differing standards of decision remove the pressure to divide all issues as going either to the

jurisdiction or to the merits. This separation approach sometimes works. *E.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (classifying as merits the number of employees to trigger Title VII). But often jurisdiction and merits do overlap, and in some instances they must overlap. Overlapping issues typify civil rights, securities, antitrust, and many other sorts of cases. So, trying always to separate jurisdiction and merits completely would be unwise. By removing the disadvantages of overlap, the prima facie standard relieves the judicial urge to divide all issues into two, mutually exclusive piles of jurisdictional and merits issues.

Fifth, the prima facie standard prevents a litigant from relitigating the merits under the guise of a jurisdictional attack. Under a prima facie regime, a default judgment will not leave the merits open to full litigation upon a collateral attack or other request for relief from judgment. Once again, differing standards of decision break the identity of jurisdiction and merits to avoid the danger. Consequently, if a defendant were later to launch a collateral attack, all that the plaintiff would have to establish on the overlapping jurisdictional issues is a prima facie showing.

For the purposes of the instant case, the related procedural lesson is that, on appeal from a litigated judgment, the appellant cannot avoid restrictions on reopening the merits simply by calling the attack a jurisdictional inquiry. Subject-matter jurisdiction is a different issue from the merits, governed by a different standard of decision. Once the appellate court decides that the lower court had subject-matter jurisdiction,

the appellate court should review the merits under its normal limitations on reviewability.

B. The Prima Facie Standard Requires Only a Showing of Some Sort of Reasonable Likelihood.

The instant case does not require this Court to specify the meaning of "prima facie" beyond the sense of some sort of reasonable likelihood that the overlapping jurisdictional proposition prevails. The standard delivers all of its benefits simply by being lower than more-likely-than-not. It is a purposely malleable standard that would in application vary primarily with the nature of the issue. But here the generalized formulation suffices to conclude that this district court possessed admiralty jurisdiction.

If this Court were to specify the meaning of prima facie in this context, its task would be to assign an appropriate standard of decision to the contested jurisdictional element of vessel-hood, one that reflects the direct costs of applying the standard and the element's importance in terms of the expected value of resultant errors, giving due weight to the differential between the policy against failing to provide a forum to the jurisdictional proponent (type II error) and the policy against failing to limit the burden on the opponent (type I error). The aim is to minimize the sum of the costs, but the trick would be to specify properly the sources and magnitudes of all the various costs. Above, it was the costs of applying a preponderance

standard to overlapping jurisdictional issues – direct costs such as holding a full-dress hearing, as well as the consequences as to jury right, preclusive effect, jurisdictional doctrine, and subsequent attack – that drove the standard down to prima facie proof. Now, it is the varying differential between type I and type II error costs that causes further adjustment in the meaning of prima facie for different jurisdictional elements, so that conceivably the courts might demand a stronger jurisdictional showing on the existence of a "vessel" than on the presence of the jurisdictional amount.

In specifying the meaning of prima facie, the temptation could arise to take advantage of the term's malleability by attempting to adjust the standard with infinite fineness in response to the contested fact's importance. But the boundedly rational human mind cannot reliably make such fine adjustments, and so the law should not call upon it to do so. Just as the traditional standards of proof above equipoise have coalesced around (1) preponderance of the evidence, (2) clear and convincing evidence, and (3) beyond a reasonable doubt, the standards of decision below equipoise should follow a quantum-step approach that recognizes only the gradations of (1) slightest possibility, (2) reasonable possibility, and (3) substantial possibility. *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 Cornell L. Rev. 1115, 1143, 1152 n.144 (1987).

This task of assigning the appropriate standard of decision to each element is a typical and traditional one for the law, here made easier by the realization that the choice is among only the quantum steps on the lower half of the probability scale. Depending on the particular threshold issue's importance, "prima facie" might mean any of the standards below the more-likely-than-not standard, namely, slightest possibility, reasonable possibility, substantial possibility, or equipoise.

For overlapping jurisdictional issues similar to the one in the instant case, the Eleventh Circuit has ruled that jurisdiction exists unless it is clearly immaterial or frivolous. *E.g.*, *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (testing whether the defendant was an "employer" under ADEA); *Lawrence v. Dunbar*, 919 F.2d 1525, 1530 & n.7 (11th Cir. 1990) (testing "scope of employment" under FTCA). What that test would mean is that jurisdiction here exists if the City showed a reasonable possibility that the thing was a "vessel." *See Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003) (saying that status as employer "implicated both jurisdiction and the underlying merits of Appellant's FMLA claim," and so jurisdiction exists if plaintiff produces prima facie proof, which here means sufficient evidence to survive the summary judgment standard). Such a specification of the prima facie standard in this context, as meaning a *reasonable possibility*, appears appropriate.

III. In This Case, the Well-Established and Well-Justified Prima Facie Standard of Decision Means that the District Court Possessed Subject-Matter Jurisdiction.

Respondent City brought an in rem suit against the houseboat to foreclose maritime liens for necessaries and for trespass in the United States District Court for the Southern District of Florida.

The City founded original subject-matter jurisdiction on the admiralty provision in 28 U.S.C. § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction. . . ."). Admiralty jurisdiction encompasses a judicially specified list of case categories, which includes suits to enforce maritime liens on vessels. *See American Dredging Co. v. Miller*, 510 U.S. 443, 446-47 (1994). So the meaning of "vessel" can be critical to jurisdiction.

On the merits, the City was seeking to enforce maritime liens on a vessel. It relied, inter alia, on the Federal Maritime Lien Act, 46 U.S.C. § 31342(a) ("a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien"). The merits, then, also could turn on the meaning of "vessel."

Indeed, the court's acquisition of in rem territorial jurisdiction over Lozman's houseboat rested on the existence of a maritime lien. *See The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 216 (1867). And the

existence of a maritime lien involves the definition of "vessel." *See* Robert Force, *Admiralty and Maritime Law* 164 (Federal Judicial Center, 2004).

In short, "a ship's characterization as a 'vessel' is a mandatory prerequisite to the attachment of a maritime lien. Because a district court's authority to arrest a ship and to adjudicate an *in rem* proceeding against it requires the attachment of a maritime lien, both the lien and the district court's jurisdiction depend on a ship's status as a 'vessel.'" *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir.), *cert. denied*, 131 S. Ct. 178 (2010).

For all these purposes, "vessel" is defined in 1 U.S.C. § 3 ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."). Nevertheless, determining vessel-hood for jurisdictional purposes is a separate inquiry from vessel-hood on the merits, because a lower standard of decision governs the jurisdictional inquiry.

A. In Addition to All Other Possible Arguments, Subject-Matter Jurisdiction Existed by Virtue of the Lower Standard of Decision.

Petitioner Lozman, assuming a defensive posture in the district court, (1) unsuccessfully argued for lack of subject-matter jurisdiction on the ground that his houseboat was not a "vessel" and (2) unsuccessfully litigated the merits while possibly further urging

with a lack of clarity that his houseboat was not a "vessel."

To be more precise, in the district court Lozman moved to dismiss for lack of subject-matter jurisdiction. The district court denied the motion, seemingly on the ground that the City had established vesselhood sufficiently for jurisdictional purposes.[3] Later, on partial summary judgment, the district court decided that the houseboat actually was a "vessel."[4]

In Lozman's appellate brief, his principal argument came under this heading: "The District Court Exercised Admiralty Subject Matter Jurisdiction When The Structure Was Not A Vessel."[5] On certiorari, he framed the Question Presented in terms of a challenge to the existence of "federal maritime jurisdiction."[6]

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[3] *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel, Approximately Fifty-Seven Feet in Length*, No. 09-80594-CIV (S.D. Fla. Sept. 9, 2009), Add. to Resp. Br. 1a.

[4] *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, No. 09-80594-CIV (S.D. Fla. Nov. 19, 2009), App. to Pet. Cert. 33a, 38a-42a.

[5] Brief for Claimant-Appellant at 12-26, *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259 (11th Cir. 2011) (No. 10-10695), 2010 WL 6019487.

[6] Question Presented: "Whether a floating structure that is indefinitely moored receives power and other utilities from shore and is not intended to be used in maritime transportation or commerce constitutes a 'vessel' under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction."

The position of *amicus* is that Lozman is certainly wrong on the jurisdictional point. Subject-matter jurisdiction existed, because the plaintiff needed to make only a prima facie showing on any jurisdictional issue that overlapped the merits, such as the question of whether the houseboat was a "vessel." The City made the necessary showing to sustain subject-matter jurisdiction. Given jurisdiction, the more difficult issue before the courts below, and now perhaps before this Court if Lozman has preserved the issue for review, is the meaning of "vessel" for purposes of the merits. But regardless of the difficulties in defining "vessel," subject-matter jurisdiction in this case was easy to establish because of the lower standard of decision.

The ease of the jurisdictional issue explains why neither the district court nor the Eleventh Circuit treated subject-matter jurisdiction as being in doubt. The lower courts apparently applied the prima facie standard – consciously or intuitively – to confirm quickly the existence of subject-matter jurisdiction, and then proceeded to treat the merits with more care. The bulk of their opinions treated vessel-hood on the merits, under the ordinary standard of decision.

The other key cases in the area – such as *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) – read the same way. They do not act at all as if subject-matter jurisdiction is in doubt. Often, they do not even advert to the underlying question of jurisdiction. Instead, they pass directly to the merits, ruling on how to interpret

vessel-hood for the purposes of the ultimate merits. Theirs is the proper course of decision. Federal courts should surely have jurisdiction to spell out the definition of "vessel" for the purposes of federal law.

B. On the Merits, Petitioner Cannot Now Introduce New Matter Under the Guise of Challenging Subject-Matter Jurisdiction.

A major reason for separating out the issue of subject-matter jurisdiction, deciding it, and getting it off the table is to prevent a party from relitigating the merits under the guise of rechallenging subject-matter jurisdiction.

Subject-matter jurisdiction is open to attack on appeal. For an issue common to the jurisdiction and the merits, the temptation for a party is to reopen the issue by attacking jurisdiction. Then the party can introduce new theories, grounds, and even evidence.

However, recognizing that a different standard of decision applies to the jurisdiction than to the merits would close off this end-run. As long as the jurisdictional proponent has shown a reasonable likelihood that the jurisdictional proposition prevails, then the opponent's further attack on the issue is an attack on the merits – subject to the usual constraints on reopening old and raising new disputes.

So here, a reasonable likelihood existed that the houseboat was a "vessel." Subject-matter jurisdiction

therefore existed. Now Lozman's challenge could only go to the merits determination. He cannot now forward new facts, say, concerning the purpose of constructing his houseboat, in order to change the result on vessel-hood. He cannot introduce new theories, grounds, or evidence to undermine the adverse summary judgment and trial results.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent's brief, this Court should uphold the findings below that subject-matter jurisdiction existed.

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AMICUS CURIAE BRIEF

RECORD AND BRIEF

No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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IN THE

Supreme Court of the United States

No. 11-626

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF *AMICUS*[1]

The Maritime Law Association of the United States ("MLA") is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of approximately 3,000 attorneys, law professors and other distinguished members of

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

the maritime community. The MLA is affiliated with the American Bar Association, and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, underwriters, financiers and other maritime claimants and defendants. MLA members include private practitioners, in-house counsel, academics and members of the judiciary.

The MLA's purposes, as stated in its Articles of Incorporation, are:

> To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.[2]

In an effort to promote these objectives, the MLA has supported legislation dealing with maritime matters and has cooperated with Congressional committees and Executive Branch agencies in the formulation of legislation and federal maritime

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[2] "About the MLA," MARITIME LAW ASSOCIATION, http://www.mlaus.org (last visited July 11, 2012).

policy. The MLA also assists with international maritime programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction.[3] Indeed, the MLA filed a *certiorari*-stage *amicus* brief in this case encouraging the Court to resolve the circuit conflict that has arisen between the Fifth and Eleventh Circuits.

With the consent of all parties, the MLA submits this brief as *amicus curiae* out of deep concern that the growing "split in the circuits" over the definition of "vessel" in Title 1, Section 3 of the U.S. Code may jeopardize a wide range of commercial and legal interests in the maritime field. The errant body of law of concern to the MLA emanates chiefly from the United States Court of Appeals for the Fifth Circuit, as well as more recent rulings by the United States Court of Appeals for the Seventh Circuit and a growing number of state courts. The correct view of the vessel status test has been followed by the court below, the United States Court of Appeals for the Eleventh Circuit. We urge that that view prevail here.

SUMMARY OF ARGUMENT

The crux of the jurisdictional issue presented here is the meaning of the term "vessel" as defined for many years in 1 U.S.C. § 3: "The word 'vessel'

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[3] *E.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (2006). The definition contains a simple disjunctive test to determine whether an object is a vessel. Is the object *used* as a means of transportation on water or, if not, is it *capable* of being so used? If the answer to either question is yes, the object is a vessel under U.S. law.

The clarity of this statutory standard has come under siege by the Petitioner and his supporting *amici*. The briefs are full of policy arguments and speculation on how the federal courts might best shape and contour their admiralty and maritime jurisdiction going forward but are remarkably thin on analysis of the actual words of the statute. Indeed, two of the *amici* briefs (by the three law professors[4] and the Floating Homes Associations) never even include the words of the statute.

The positions of Petitioner and his supporting *amici* raise serious uniformity and policy concerns for the MLA, as they should for this Court as well. For instance, Petitioner argues that the general maritime concept of a "vessel in navigation" has now been written into 1 U.S.C. § 3 by this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005). *See* Pet. Br. at 29 n.12. The MLA is concerned both that this is a flat misreading of *Stewart* and that serious adverse unintended consequences would flow from the judicial result urged by Petitioner.

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[4] The law professors' brief in support of Petitioner is cited "Three Law Professors' Br." to distinguish it from the law professors' brief in support of Respondent.

Petitioner espouses unstable and open-ended "vessel" criteria that present an even more serious problem for the vessel documentation, ship mortgage and maritime lien enforcement provisions of Title 46 of the U.S. Code. In particular, the validity and enforceability of preferred ship mortgages and maritime liens cannot survive the intent-based "snapshot" view of vessel status urged by Petitioner.[5] Instead, Petitioner's position would foist on preferred mortgagees and maritime lienors an even worse "snapshot" test. For if "in navigation" is truly a central element of the existence of a vessel itself, then mortgagees and lienors would lose their liens whenever a vessel goes into layup or otherwise goes out of "navigation," either objectively or in the subjective intent of its owner. Worse yet, if subjective intent becomes relevant or even dispositive, as Petitioner urges, the maritime community would face the very real possibility of treating two identical watercraft differently based not on their physical status at a given moment, but on the intentions of their owners with respect to future use.

Also problematic is the amorphous concept of a "permanently" or "indefinitely" moored structure proposed by Petitioner and his supporting *amici*. Permanence, originally used to convey a practically irreversible physical connection or condition, has now been wrongly transformed by some courts to mean the absence of any present intention of the vessel's

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[5] The so-called "snapshot" approach to vessel status, which focuses on what the vessel was doing at the moment of injury, has twice been rejected by this Court. *See Stewart*, 543 U.S. at 495; *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995) (citation omitted).

owner to use the craft in future transportation on water.

Lastly, Petitioner's Question Presented[6] is itself ambiguous and somewhat elusive and, indeed, never fully addressed in Petitioner's own brief. The word "intended" in Petitioner's Question Presented invokes the subjective analysis advocated by the Fifth and Seventh Circuit case law following *Stewart*, to the detriment of the "practically incapable of transportation or movement" test in *Stewart*. *See* 543 U.S. at 494.

ARGUMENT

I. THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED THE DEFINITION OF "VESSEL" AND SHOULD BE AFFIRMED.

A. The Definition of "Vessel" in 1 U.S.C. § 3 Has a Plain Meaning.

The definition of "vessel" in 1 U.S.C. § 3 ("Section 3") is the default definition of "vessel," applicable "throughout the U.S. Code 'unless the context indicates otherwise.'" *Stewart*, 543 U.S. at 490 (citing 1 U.S.C. § 1). Section 3 does not establish different definitions of "vessel" for different purposes. Nor have the courts, to our knowledge, construed Section 3 to have more than one meaning.

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[6] Petitioner's Question Presented is: "Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction." Pet. Br. at i.

The "vessel" definition, in its entirety, provides:

> The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3 (2006). The definition is phrased in the disjunctive, establishing either actual use or capability as the test. With respect to capability, nothing in this definition speaks or alludes to the entry of a watercraft in navigation or the withdrawal of a watercraft from navigation as a criterion to either establish or disprove the existence of a "vessel." There is also no indication in the definition that "intent" of any person is relevant to the determination of what is a "vessel."

The MLA believes that whether a vessel is "in navigation" is relevant to determine whether an onboard employee is a seaman and for some other purposes, but that the definition of "vessel" itself does not and cannot turn on whether it is "in navigation." "Vessels in navigation" must be regarded instead as a subset of the universe of "vessels" defined by Section 3.

A number of briefing parties, citing *Stewart*, suggest that 1 U.S.C. § 3 is merely a codification of what the general maritime law considered a "vessel" for purposes of maritime law and that it therefore incorporates the "in navigation" concept. *See, e.g.*, Pet. Br. at 13, 16, 22; Three Law Professors' Br. at 5-6. We agree that the enactment of 1 U.S.C. § 3 did not expand the reach of the general maritime law, which would continue to apply to vessels "in navigation." But there is no support at all for the idea that there has been an "in navigation" qualifier embedded

in the definition of "vessel" since its enactment into law in 1873.[7]

B. The Plain Meaning of 1 U.S.C. § 3 Compelled the Eleventh Circuit to Affirm the District Court.

The Eleventh Circuit applied the plain meaning of "vessel" under 1 U.S.C. § 3 and correctly affirmed the district court's ruling that Petitioner's floating home was a "vessel." By being moored, unmoored and towed with relative ease before and after its arrest, the floating home was readily found by both courts to satisfy the 1 U.S.C. § 3 criteria and to have been "in navigation."[8]

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[7] In 1866, when the earliest precursor of Section 3 was enacted as part of an anti-smuggling statute, *see Stewart*, 543 U.S. at 489 n.3 (citing ch. CCI, § 1, 14 Stat. 178 (1866)), the term "vessel" was understood to mean much more than a "vessel in navigation." Certainly, a vessel had to be in navigation for persons working aboard her to be seamen and for providers of necessaries to acquire a maritime lien. However, the term "vessel" itself was understood to refer to the physical ship regardless of whether she was in navigation. Federal courts sitting in admiralty have always had jurisdiction over cases brought *in rem* against vessels without regard to whether they were in or out of navigation at the time of arrest. There is no basis to conclude that the definition of "vessel" formulated in 1866 and enacted into its current statutory framework in 1873 would not have encompassed this broader meaning of the term in usage from the dawn of the Republic and even before.

[8] The maritime lien on Petitioner's floating home was premised on the provision of "necessaries" by the lienor (Respondent). *See* US Br. at 22-23 & n.7. On the uncontested facts of record, Petitioner's floating home would readily satisfy the criteria for a vessel in navigation when it incurred this lien while docked at Respondent's marina.

Petitioner criticizes the Court of Appeals for failing to construe the word "transportation" narrowly in 1 U.S.C. § 3 to exclude vessels designed merely to move about on the water without carrying passengers or goods. *See* Pet. Br. at 17-20. This restrictive interpretation of "transportation" was rejected long ago in *The International*, 89 F. 484 (3d Cir. 1898), a case cited favorably in *Stewart*. *See* 543 U.S. at 490 n.5, 491. In concluding that a dredge was a "vessel" under the predecessor of 1 U.S.C. § 3, the Third Circuit held that "[t]he word 'transportation' is not expressly or impliedly limited to the carriage of passengers or merchandise for hire." *The International*, 89 F. at 485. Moreover, as in *Stewart*, the record below in this case indicates that Petitioner's watercraft was actually used to transport itself and its contents over water on a number of occasions, some of which involved transport over substantial distances.

C. Seaworthiness Is Not Relevant to Vessel Status.

Petitioner essentially claims that his craft was not suitable for movement over water and was not seaworthy in its design or construction. Pet. Br. at 3-5, 15-16. But seaworthiness is not a criterion for establishing the existence of a vessel. Nor could it be. Otherwise no vessel could be found unseaworthy, and breaches of the warranty of seaworthiness would have no remedy. *See North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 122-23 (1919) (affirming vessel status for "the American steamer *Yucatan*, . . . which was of steel construction, was in need of extensive repairs. She had been wrecked, and had remained submerged for a long time; ice floes had torn away the upper decks,

and some of her bottom plates also needed to be replaced.").

D. Petitioner's Vessel Was Not an Extension of Land or Permanently Moored.

Petitioner's contention that his floating home was intended to be an extension of land is also unconvincing. He may well have intended that his watercraft serve a housing function usually served on land. But he chose to acquire mobile housing on water and to impose himself on the navigable waters of the United States. Petitioner's craft was not a pier, floating dock or "extension of land," any more than a houseboat is an extension of land. Nor did Petitioner's craft resemble the "floating homes" of concern to the Floating Homes Associations.[9] Petitioner's shallow draft craft, kept afloat by the principle of displacement, was certainly not analogous to a "floating home."[10]

The Court of Appeals further noted that whether a watercraft has become a non-vessel depends on whether it has been "rendered practically incapable of transportation or movement," citing its own decision in *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir.

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[9] The Floating Homes Associations' *amicus* brief describes "floating homes" atop flotation structures of twenty tons of logs or other massive understories, moored in large, multi-user, preplanned facilities akin to mobile home communities. Floating Homes Associations' Br. at 9, 14.

[10] Petitioner's craft had a draft of ten inches and appears to have been secured by less restraint than any other vessel in the marina. JA at 39. Its water and sewage connections, a garden hose and an open discharge into the marina waters, respectively, JA at 38, 42, 53, were clearly not indicative of a "permanent mooring."

2008), which in turn relied on this Court's decision in *Stewart*:

> Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or *otherwise rendered practically incapable of transportation or movement*.

543 U.S. at 494 (emphasis added). There was no showing at all that this standard had been met here.

E. "Permanent Mooring" Should Depend on Physical Characteristics and Not Subjective Intent.

Instead of certainty and uniformity in the treatment of similar watercraft, the trending case law in the Fifth Circuit and elsewhere threatens a chaotic and inconsistent patchwork quilt of little precedential value. This is certainly the case if individual intent were to be a factor in determining what is a "vessel" within the meaning of 1 U.S.C. § 3. However, *Stewart* made plain that the standard for determining vessel status is an objective one and not based on subjective intent. 543 U.S. at 494.

While an owner's intent may have some bearing on whether a vessel is "in navigation" or "withdrawn from navigation," it is transparently impossible to say the physical object before the Court in any case is or is not a "vessel" based on its owner's declared, unverifiable and non-binding intent for future use. Logic and common sense dictate that whether a watercraft is a "vessel" within the meaning of Section 3 can only be an objective inquiry based on use or capability.

After decoupling the "in navigation" requirement from the definition of the physical "vessel," or the "existential vessel" as one commentator has noted,[11] there still remains a need to determine when physical alteration transforms the *res* from a "vessel" into something else. When the transformed *res* is no longer practically capable of transportation on water, it is "incapacitated" from such a function. This might be found when a vessel is made a physical fixture to a dock or other structure on land. However, it should not be found permanently affixed, and therefore transformed, unless the manner of its affixing is irreversible as a practical matter.

The compelling implication of the phrase "permanently moored or *otherwise* rendered practically incapable of transportation or movement," *Stewart*, 543 U.S. at 494 (emphasis added), is that "permanent mooring" itself requires a finding that a vessel has been thus "rendered incapable of transportation or movement." "Permanently moored" cannot be excised from this passage of *Stewart* and substituted into future cases as a new, freestanding test of "non-vesselhood." Just as today's declared permanent resident of New York City can choose to move away tomorrow,[12] the fact that a vessel owner states his intent today to remain permanently moored is meaningless speculation that has no bearing on whether

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[11] Bruce A. King, *Ships as Property: Maritime Transactions in State and Federal Law*, 79 TUL. L. REV. 1259, 1289 (2005).

[12] *See Dist. of Columbia v. Murphy*, 314 U.S. 441, 451 n.2 (1941) (reviewing the District of Columbia Income Tax Act) ("We do not understand 'permanent' to have been used in a literal sense. Of course it cannot be known without the gift of prophecy whether a given abode is 'permanent' in the strictest sense.").

today's mooring arrangement is practically reversible.

The essence of the term "permanently moored" has not been directly addressed by this Court. It is clear though that "permanently moored" must mean something more than "withdrawn from navigation." The case law since *Stewart* has produced examples of what is considered "permanently moored," but these range from descriptions of vessels rendered physically or economically incapable of returning to navigation as a practical matter to examples of vessels considered withdrawn from navigation based on the owner's declared absence of an intent to return them to a transportation function.

Cases decided since *Stewart* have struggled with the concept of "permanently moored structures." *See Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (vessel status issue remanded for potential consideration of owner's "intent"); *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D*, 2010 AMC 404 (D.N.J. 2009) ("key factor" is whether connection to shore "make[s] immediate egress to navigable waters not a practical possibility"); *Martin v. Matt Canestrale Contr. Inc.*, 658 F. Supp. 2d 668 (W.D. Pa. 2009) (river barge found to be a vessel based on *Stewart* and related cases). The range of applications of "permanently moored" has thus acted to deprive the term of any reliable meaning. Of late, to make the exception to vessel status even more open-ended, the word "permanently" has even been replaced with the word "indefinitely," such as in Petitioner's Question Presented here.

Based on the relevant precedents of this Court and their progeny, some courts have developed clear,

pragmatic guidelines for the "permanently moored" element of the *Stewart* decision. For example, in *Sea Village Marina*, the district court observed:

> In addition to these cases cited by *Stewart*, there are a few dozen federal cases grappling with the definition of vessel in the context of a craft that is currently floating and can be towed but that is moored in place. Though each case examines the totality of the circumstances to determine whether the craft remains a vessel, a common thread unites them. The key factor in cases finding that a craft has lost its vessel status is that the former vessel (if not removed from the navigable waters entirely) be moored in such a way as to make immediate egress to navigable waters not a practical possibility. [Citing *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627 (1887), *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) and other cases.] Unsurprisingly, the actual nature of the mooring—whether the connection to the shore is permanent or otherwise impractical to sever at short notice—is at the hear[t] of what it means to be "permanently moored" in a way that prevents the "practical possibility" of transportation on water.

2010 AMC at 411-12. None of these criteria exists here, as Petitioner's craft could readily move on short order and often did. *See* Resp. Br. at 5, 9, 48-49.

II. A VESSEL WITHDRAWN FROM NAVIGATION REMAINS A VESSEL IF IT SATISFIES THE PLAIN LANGUAGE OF 1 U.S.C. § 3.

A. The *Stewart* Case Cited and Approved the "Withdrawn from Navigation" Doctrine.

Stewart was a Jones Act case in which claimant's rights to recover depended on his status as a seaman, which, in turn, depended on his employment aboard a vessel in navigation. *See Stewart*, 543 U.S. at 485-86. In finding that an injured employee was a seaman, *Stewart* held that a dredge was indeed a vessel even though its primary function was dredging and its movement on water was only occasional and limited. *Stewart*, in turn, acknowledged that vessels sometimes go out of navigation. *See* 543 U.S. at 496 (citing *Chandris*, 515 U.S. at 373-74; *Roper v. United States*, 368 U.S. 20, 21, 23 (1961); *West v. United States*, 361 U.S. 118, 122 (1959)). *See also Pavone*, 52 F.3d at 569 ("concept of 'withdrawn from navigation' . . . [is] certainly alive and well in this circuit").

The concept of a vessel "withdrawn from navigation" was endorsed by this Court in earlier cases as well. *See, e.g., Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952) (denying Jones Act recovery to worker fatally injured while working on a vessel during its winter layup); *Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam) (judgment reversed and cause remanded for trial of the issue of "whether or not the tug *G. W. Whiteman* was in navigation . . ." such that decedent would qualify as a Jones Act plaintiff); *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959) (noting that a ship rendered temporarily "dead" and

"out of navigation" with its electric generators dismantled and all personnel evacuated to allow hazardous repairs and maintenance is still referred to as a "vessel").

Professor Rutherglen's article, cited by Petitioner and others, *e.g.*, Pet. Br. at 24, 29 and 44; US Br. at 11, 19, describes the life cycle of a vessel and the stages at which, in his view, it might be deemed to have become a "dead ship." As Rutherglen points out, there is a vast difference between a vessel "withdrawn from navigation" and one that has been rendered practically incapable of use as a vessel.[13] By urging the Court to erase this vast difference, Petitioner and his supporting *amici* would foster chaos in admiralty law generally and render 1 U.S.C. § 3 unusable for a number of statutory regimes in federal shipping law.

Petitioner's view reduces vessel status to the ultimate "snapshot" test. A watercraft withdrawn from navigation for either winter storage or "cold layup," in Petitioner's view, would cease to be a vessel for all purposes.[14]

The treatises and case law indicate that vessels can be "temporarily moored" for a long time and that

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[13] "'Dead ships' are not the opposite of 'vessels in navigation.' A vessel can be out of navigation and still be a vessel." George Rutherglen, *Dead Ships*, 30 J. MAR. L. & COM. 677, 690 (1999).

[14] The Coast Guard recognizes that a vessel remains a vessel even when it is withdrawn from navigation. *See* 46 C.F.R. § 567.313(b) (2011) (excusing documentation-on-board requirement "[w]hen the *vessel* is in storage or out of the water") (emphasis supplied); *see also* 46 C.F.R. § 24.05-1(a) (2011) (excusing vessels from inspection "while laid up and dismantled and out of commission").

their status as "vessels" is not impaired. *See* 1B BENEDICT ON ADMIRALTY § 11(b) n.20 (7th ed., rev. 2011), and cases therein noted. Legions of craft are withdrawn from navigation at various times: Great Lakes and inland marine vessels beached or removed from water to avoid winter ice; yachts encased in shrink wrap for the winter season; and large commercial vessels prepared for storage at anchor to await an improved market, which might take years. *See, e.g., Erie v. S.S. North Am.*, 267 F. Supp. 875 (W.D. Pa. 1967) (sustaining maritime lien on a vessel withdrawn from navigation due to winter layup). All these vessels find themselves withdrawn from navigation by their owner's intent. No Jones Act claim could arise for employee service to them during such withdrawal, but they surely must still be regarded as vessels.

B. Narrowing 1 U.S.C. § 3 to Exclude Vessels Withdrawn from Navigation Would Create Significant Adverse Impacts on Other Provisions of Federal Law.

As this Court noted in *Stewart*, "the 'in navigation' requirement can be viewed as an element of the vessel status of a watercraft. It is relevant to whether the watercraft is used, or capable of being used, for maritime transportation." *Stewart*, 543 U.S. at 496. But it is not indispensible.[15] Certainly,

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[15] Petitioner is flatly incorrect to suggest that *Stewart* abolished the "vessel in navigation" concept and replaced it with the Section 3 "vessel" definition. *See* Pet. Br. at 29 n.12. No such issue was presented in *Stewart*. The case focused on how to define "vessel" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G) (2006), not on whether the entire subject of vessels in navigation and vessels withdrawn from navigation should be absorbed into Section 3 for all purposes.

actual use "in navigation" constitutes "use" and is also dispositive on the question of capability to use. However, this observation in *Stewart* does not state that the absence of actual use in navigation determines that a watercraft is not "capable." To reach such a conclusion, one would have to determine that the capability test is surplusage in 1 U.S.C. § 3. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION, § 46:6, 230-42 (7th ed. 2007) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ."). Instead, *Stewart* takes note of objective factors that might negate a finding of capability, such as permanent mooring. *See Stewart*, 543 U.S. at 493. As a conceptual matter, the Court explained in *Stewart* that "the question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496.

There is no obvious benefit to any party in implying an "in navigation" requirement into either of the definitional tests in Section 3, "use" or "capability." But great mischief may flow from such an exercise. While many recent cases construing this section, including *Stewart* and the subsequent cases cited by Petitioner, involved the status of seamen under the Jones Act,[16] Section 3 is also incorporated into or

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[16] In Jones Act cases, a "vessel in navigation" is often called a "Jones Act vessel" or a "vessel." On occasion, a vessel found not to be "in navigation" in such cases will be referred to as a "nonvessel" when, in fact, the more correct term would be "vessel withdrawn from navigation." *See, e.g.*, *Pavone*, 52 F.3d at 564, 568-70 & nn. 23, 24 (vessels outside Jones Act coverage deemed "nonvessels"); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992) (same).

cited by a number of other provisions of the U.S. Code.[17] The viability of the other statutory regimes and the realization of the Congressional intent they embody should compel this Court to clarify the distinction between a Section 3 "vessel" and the concept of "vessel in navigation" for Jones Act purposes.

The preferred mortgage provisions in the Commercial Instruments and Maritime Lien Act of 1988 ("CIMLA") and its predecessor ship mortgage acts[18] were enacted to enable ship owners to finance their vessels and operations with devices and structures not available in the general maritime law. These laws granted preferred mortgage holders lien status and a ranking above all liens and claims apart from preferred maritime liens. The statutes also gave to mortgagees rights found only in admiralty to arrest mortgaged vessels *in rem* on default of preferred mortgages and gave to Article III courts the exclusive power to order the sale of such vessels free and clear of all liens.

Before 1920 in the United States, a ship mortgage had no priority vis-à-vis maritime liens and no means of effective enforcement in foreclosure. Congress

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[17] Such incorporation grew even more widespread in 2006, when Congress made 1 U.S.C. § 3 applicable to the entirety of Title 46, instead of just Subtitle II thereof. *See* Pub. L. No. 109-304, § 4, 120 Stat. 1485, 1487 (2006) (new 46 U.S.C. § 115 (2006) (which defines "vessel" for the entirety of Title 46 as follows: "In this title, the term 'vessel' has the meaning given that term in section 3 of title 1."). The new Section 115 replaced 46 U.S.C. § 2101(45) (2006), which also adopted the Section 3 definition, but only for Subtitle II (Vessels and Seamen (Sections 2102-14702)).

[18] Federal Maritime Lien Act, Pub. L. No. 61-259, 36 Stat. 604-05 (1910) (uniform law of maritime liens); Ship Mortgage Act, Pub. L. No. 66-261, 41 Stat. 988, 1000-06 (1920) (creation of preferred ship mortgages).

enacted the Ship Mortgage Act of 1920, the predecessor to a series of statutes culminating in CIMLA, with the express purpose of encouraging investment in the U.S. flag merchant marine. This objective was spelled out in the legislative history and strongly endorsed by this Court's decision in *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934), which upheld the new statutory scheme, as follows:

> We cannot fail to regard the encouragement of investments "in shipping and shipping securities"—the objective of the Ship Mortgage Act—as an essential prerogative of the Congress in the exercise of its wide discretion as to the appropriate development of the maritime law of the country. The regulation of the priorities of ship mortgages in relation to other liens, and the conferring of jurisdiction in admiralty in order to enforce this regulation, are appropriate means to that legitimate end.

293 U.S. at 48.

A preferred mortgage depends on the existence of a "documented vessel" or one whose documentation is in process by virtue of a proper application. The necessary predicate for documentation, or for the filing of an application for documentation, in turn, is the underlying existence of a "vessel." Nothing in either Chapter 121 or Chapter 313 of Title 46 suggests or implies any requirement that such a vessel must be, at any time or at all times, "in navigation." The documentation provisions do not have a separate definition of "vessel" and rely, in this respect, on 1 U.S.C. § 3 as the definition of "vessel" for all of Title 46. *See* 46 U.S.C. § 115 (2006).

Documentation of a United States vessel must be renewed annually or it expires. The Coast Guard has no authority to continue to document what it does not believe to be a "vessel." Documentation is invalidated if a vessel "no longer meets the requirements of this Chapter . . . ," 46 U.S.C. § 12135(1) (2006), except that documentation is deemed to continue for purposes of any preferred mortgage "filed or recorded before the date of invalidation." 46 U.S.C. § 12136(c)(1)(a) (2006). However, even if the documentation remains of record, lapses in vessel status would negate preferred mortgage liens or other liens that attach only to "vessels." Thus, these provisions on their face are not enough to safeguard a mortgagee if the thing mortgaged is found either (1) not yet to have been a "vessel" when first documented and mortgaged or (2) to have ceased to be a "vessel" within the meaning of 1 U.S.C. § 3 at any time thereafter.

According to the Gaming Association *amicus* brief, many of the "dockside casinos" owned by its members are documented or registered with the Coast Guard or inspected by the Coast Guard. Gaming Ass'n Br. at 9-12, n.8. Also, in the eleven post-*Stewart* cases cited by the Gaming Association, the courts ruled on eight occasions (involving a total of seven separate "dockside casinos") that the watercraft therein were not vessels. Gaming Ass'n Br. at 9-14. Petitioner's logic would presumably require the Coast Guard to revisit eligibility of these floating casinos for documentation purposes as well. And, if Gaming Association members whose floating casinos are financed through preferred ship mortgages have now "walked their collateral" out of vessel status by "permanently" or "indefinitely" mooring them to the shore, then the validity of their mortgages would be at issue as well

as the enforceability of *in rem* remedies against the collateral.

The troubling inconsistency in the interpretation of the 1 U.S.C. § 3 definition is starkly evident in the case of the *Boomtown Belle II*, a floating casino owned by Louisiana A-1 Gaming (the "Boomtown Owner"), a member of the Pinnacle Entertainment group. The *Boomtown Belle II* is listed as the "Boomtown Casino (Westbank)" in the Gaming Association *amicus* brief. *See* Gaming Ass'n Br. at app. 3a. As reported in that brief, the Louisiana state court determined that the *Boomtown Belle II* was not a vessel and was not governed by federal maritime law. *Id.* at 10 (citing *Bourgeois v. Boomtown, L.L.C.*, 2009 WL 5909119 (La. App. 5 Cir. 5/21/09), *writs denied*, 09-1357 (La. 9/25/09), 18 So. 3d 68; *cert. denied*, 130 S. Ct. 1699 (2010)). The *Bourgeois* case is cited by the Gaming Association as support for the proposition that a vessel withdrawn from navigation is no longer a vessel. *Id.* The court indeed found that the floating casino was not a "vessel" under *Stewart* or the general maritime law. *Bourgeois*, 2009 WL 5909119, at 1. This finding in turn was based on evidence that the vessel had been moored in the same location for some time and was not "in navigation or capable of navigation." *Id.* at 2.

While we have no doubt that the *Boomtown Belle II* would have been well secured for its function as a dockside casino, the "permanence" of its attachment to land seems unlikely to have deprived the craft of its capability to engage in transportation on water.[19]

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[19] Of course, if the *Boomtown Belle II* had been permanently affixed to land such that it could not meet either branch of the Section 3 definition, it would no longer be a vessel, and the

In this respect, *Boomtown Belle II* reflects a widespread ambiguity in the decisional law following *Stewart*, where "permanently" has been taken to mean "indefinitely" and not dependent on the practical irreversibility of the connection made to land.

There is nothing ambiguous though about the status of the *Boomtown Belle II* in the official records of the U.S. Coast Guard's National Vessel Documentation Center ("NVDC"), where all the transactions bearing on title to the craft and its various mortgages and encumbrances have been duly recorded since it was first constructed in 1995. To illustrate the concerns and arguments of the MLA, the official Abstract of Title of this craft, as of July 5, 2012, has been obtained for purposes of this *amicus* brief. *See* DEP'T. OF HOMELAND SECURITY, U.S. COAST GUARD, NO. 1028319, "BOOMTOWN BELLE II" GENERAL INDEX OR ABSTRACT OF TITLE 15-22 (July 5, 2012), true and correct copies of the cited pages of which are contained in Appendix A.[20] These pages of the Abstract of Title reflect the entire period from acquisition by the Boomtown Owner to the present and show that before, during and after the decision in *Bourgeois*, the Boomtown Owner documented the structure as a "vessel" without interruption and granted preferred ship mortgages to secure obligations of up to $1.5 billion. *See, e.g.*, App. A at 6a (preferred ship mortgages on the *Boomtown Belle II* granted on December 30, 2005 and November 14,

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validity of its documentation and preferred ship mortgages would be in question.

[20] The complete original of this document is on file with counsel for the MLA and will be lodged with the Clerk's Office on request.

2006 to secure indebtedness of $750,000,000 and $1,500,000,000, respectively). The latter preferred ship mortgage remains in place to this day, securing a face amount of indebtedness of $1,500,000,000. *Id.* at 8a (as of July 5, 2012).

Moreover, the Boomtown Owner is required to renew the *Boomtown Belle II's* certificate of documentation annually and in doing so affirms that the *Boomtown Belle II* is entitled to its expiring documentation status and trade endorsements. *See* 46 C.F.R. § 67.163 (2011). Based on the activity reflected in the Abstract of Title, the Boomtown Owner appears to have renewed the vessel's documentation every year and made that affirmation.

So the *Boomtown Belle II* is a nonvessel in a state court tort action and a vessel at the NVDC. But 1 U.S.C. § 3 cannot mean one thing to maritime tort victims and another to preferred mortgagees. The MLA believes this case provides the right vehicle for this Court to restore both the plain meaning of the "capability" test in 1 U.S.C. § 3 and the distinctiveness of the "capability" test from the "use" test. The MLA also urges the Court to halt the continued conflation of 1 U.S.C. § 3 with the general maritime law concept of a "vessel in navigation" and the ever-expanding notion of "permanently moored." Anything short of a strong clarification of 1 U.S.C. § 3, we submit, will yield terribly destructive results in ship finance, endangering the congressionally intended benefits of the preferred mortgage.

C. Arrest and Foreclosure of a Vessel to Enforce a Maritime Lien or Preferred Mortgage Cannot Be Made to Depend on Whether the Vessel Is "In Navigation."

No provision of CIMLA, or any other statute of which we are aware, permits an erstwhile preferred mortgagee to have the privileges, priorities and enforcement rights, such as arrest, foreclosure and sale free and clear of all liens, against the collateral once the collateral is no longer a "vessel," as defined in 1 U.S.C. § 3. These provisions also establish the relative priority of preferred mortgages and maritime liens as to both federally documented vessels and foreign registered vessels arrested in the United States. Petitioner's reasoning would suggest that a vessel in layup status or one that is indefinitely tied up to shore as a floating casino may not be arrested and foreclosed upon in an *in rem* proceeding. Surely this is not what Congress intended. Indeed, such a result would thwart Congressional purposes.

Ship lenders depend on the validity and enforceability of a preferred mortgage over the entire term of a loan until the loan is either repaid or the lender proceeds through arrest and foreclosure to realize upon the value of the vessel at auction to satisfy the unpaid obligations. If the vessel is destroyed, the mortgage will fail because the vessel no longer exists.[21] Similarly, mortgage documents often prohibit the owner from incorporating the vessel as a fixture to real estate for fear of changing the physical nature of the vessel into something, such as the *Boomtown Belle II*, that is purportedly not capable of transportation over water.

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[21] In the event of marine casualties, mortgagees customarily rely on rights to insurance proceeds.

However, in no case would a ship mortgage financing be possible if the mortgagee had to live in fear that the status of the mortgagee's collateral could depend on whether it was at all times "in navigation" or that its status was jeopardized because it had been "withdrawn from navigation" "indefinitely." While the questions of "in navigation" or "withdrawn from navigation" are useful factors often used in tort analysis to determine the relationship to traditional maritime activity, they confuse the issue in determining whether a particular watercraft is a "vessel" for purposes of vessel documentation and ship finance.

A further adverse effect would appear in any *in rem* action commenced in the United States against a vessel, including a vessel under foreign flag. Rights of parties, including mortgagees and suppliers of necessaries, in enforcement actions against foreign flag vessels arrested in the United States are also provided for in CIMLA. 46 U.S.C. §§ 31301(6)(B), 31325 and 31326 (2006). But again, the provisions apply only to a "vessel." By adopting the confused concept of Petitioner and his supporting *amici*, the Court would open the door to possible challenges as to whether the *res* is a "vessel," and has been a "vessel" at all times since it was registered, and whether or not a foreign preferred mortgage equivalent can be enforced in U.S. courts.

D. The Distinction Between "Vessel Status" and "Navigation Status" Remains Vital to the Maritime Community.

Vessels may be documented and financed through preferred mortgages before they are ever placed in

navigation[22] and may remain documented and subject to preferred mortgages for long periods of inactivity and storage (called "layup") at anchor or on dry land, depending on size and circumstances. While a seaman's relationship with a vessel can be measured by voyages or months, a mortgagee's relationship may carry on for many years, during which the ship may be laid up "indefinitely," devoted to a stationary use dockside for a period of time, or otherwise be in a status that future courts or litigants might consider to be "withdrawn from navigation."

Indeed, overcapacity in the shipping industry has recently pushed ship owners to layup vessels in large numbers for periods of up to five years or more, often requiring three to four weeks of reactivation procedures before the vessels can be placed back in service. As any fair reading of the industry forms will make clear, modern layup procedures are far removed from the abandonment of derelict vessels in back channels. The Baltic and International Maritime Council ("BIMCO") has recently developed a standard form contract, titled "LAYUPMAN," to address this development.[23] The American Bureau of Shipping has also

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[22] Newly constructed vessels meet the "capability" test of 1 U.S.C. § 3 well before they are delivered or accepted as completed.

[23] *See* BIMCO, LAYUPMAN: STANDARD CONTRACT FOR THE LAYING UP OF VESSELS cvr., 1-3 (BIMCO, Copenhagen) (2011), *full document available at* http://www.bimco.org/Chartering/Documents/Ship_Management/~/media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_LAYUPMAN.ashx, excerpts of which are contained in Appendix B. *See* App. B at 15a, § 9(d) ("On completion of Re-activation the Owners shall take over responsibility for the Vessel and remove it from the Layup Site. . . . [If they] fail to remove the Vessel from the Layup Site . . . [t]he Managers shall . . . have a lien over the

dealt extensively with the subject of vessel layup and the reactivation of laid-up vessels.[24]

Nothing in the Vessel Documentation Act of 1980, 46 U.S.C. ch. 121, §§ 12101-12152 (as codified 1983), states or implies that, in addition to capability, a watercraft must also be "in navigation" to remain a "vessel." Nor does any provision of the Vessel Documentation Act state or imply that the intent of any person, including the owner, may affect vessel status.

Petitioner's argument to the contrary would expose marine lenders to another form of the "snapshot" issue already resolved for seamen in *Chandris* and confirmed in *Stewart*. If the definition of "vessel" were made to depend on whether the craft in question remained "in navigation" at all relevant times, the validity and effectiveness of a preferred mortgage or its priority relative to competing maritime and

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Vessel [to recover losses]. . . ."). BIMCO is a widely used source of forms for international vessel chartering and management transactions generally.

[24] The American Bureau of Shipping, a classification society founded in 1862, issues standards and guidelines that are widely recognized and adopted by the maritime community, including the U.S. government. *See* 46 U.S.C. § 3316(b) (2006) (expressly authorizing the Secretary of Homeland Security to delegate certain inspection and certification authorities to the American Bureau of Shipping). *See* AMERICAN BUREAU OF SHIPPING, *Guide for Lay-Up and for Reactivation of Laid-Up Ships*, *in* RULES FOR SURVEY AFTER CONSTRUCTION, pt. 7, app. sec. 3, cvr., 243-44, 252-53 (2011), *available at* http://www.eagle.org/eagleExternalPortalWEB/ShowProperty/BEA%20Repository/Rules&Guides/LinkedGeneralGuideTitles/Current/Part7_2012, excerpts of which are contained in Appendix C. *See* App. C at 18a-24a, § 1, 3 (distinguishing a "vessel in lay-up" from active-status vessels and spelling out the steps potentially needed to reactivate a laid-up vessel).

non-maritime claims could be forever lost at the first moment it is "withdrawn from navigation," for example, by being stored in long-term layup.

If a craft is substantially completed by a builder and documented by the Coast Guard, and a preferred mortgage is placed on the craft before its delivery and, therefore, before its coming into navigation, is the craft not a "vessel" at the moment of documentation? Or is the documentation therefore defective and the preferred mortgage a nullity as a result?

These unfortunately are not hypothetical questions. The Fifth Circuit decision in *United States v. Trident Crusader*, 366 F.3d 391 (5th Cir. 2004), offers a perspective on the danger to preferred mortgages posed by the proposition urged by Petitioner and his supporting *amici*. In *Trident Crusader*, Det Norske Veritas ("DNV"), a classification society, challenged a preferred mortgage in favor of the United States, which was given to secure a Title XI financing of a vessel,[25] on the grounds that the vessel was documented approximately three weeks before final completion and was therefore not a "vessel" under 1 U.S.C. § 3. DNV claimed a necessaries lien for services provided after the vessel was delivered. The Court found that, at the time of documentation, the only work left on the vessel was performance of sea trials. In upholding the preferred mortgage, the

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[25] Title XI is a government program to provide loan guaranties in support of U.S. shipbuilding. Such guarantees are issued to debt holders in return for mortgages on vessels under construction and preferred mortgages on vessels once documented. Title XI is codified today at 46 U.S.C. §§ 53701-735 (2006). There is a separate "vessel" definition for the Title XI program, which expressly includes vessels under construction. *Id.* § 53701(14) (2006).

Fifth Circuit held that the 1 U.S.C. § 3 definition did not apply to the preferred mortgage provision of CIMLA and, instead, relied on the definition of "vessel" in what was then 46 U.S.C. § 1271(b),[26] which was more expansive, taking in "all types of vessels, whether in existence or under construction . . . ." The definition relied upon by the Fifth Circuit, by its terms, applies only to the federal vessel loan guaranty programs under Title XI, and not to the vast array of preferred mortgages outside Title XI programs. The status of all vessels built in the United States, other than Title XI vessels, is governed by the definition of "vessel" in Section 3.[27]

All these questions are of acute concern if the long-standing 1 U.S.C. § 3 "capability" definition of "vessel" is burdened with the "in navigation" test used to determine Jones Act status or if the subjective intention of the vessel owner plays any part in the determination of whether a craft is a vessel.

III. STATE LAW AND U.S. COAST GUARD POLICY DO NOT AFFECT THE DEFINITION OF "VESSEL" IN 1 U.S.C. § 3.

A. As a Constitutional Matter, State Law Cannot Provide Guidance in Determining What Is a Vessel.

Article III of the U.S. Constitution and the long succession of implementing judiciary acts has re-

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[26] This provision has been recodified as 46 U.S.C. § 53701(14) (2006).

[27] The same issue could arise in arrest of foreign flag vessels in the United States if the status of such vessels can be made subject to "in navigation" tests and their mortgages rendered suspect or invalid.

served original jurisdiction over admiralty and maritime cases to the federal courts, to the exclusion of the state courts, while "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (2006). The question of what constitutes a "vessel" is fundamental to controlling and defining that jurisdiction. Indeed, the term "vessel" appears in Section 9 of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789). It is therefore inconceivable that this term could be defined by reference to what state law considers to be a "floating home," houseboat or any other vessel. The Court of Appeals correctly observed that the fact that Florida state law regards the watercraft in question as a "floating home," and not a "vessel," is irrelevant. Pet. App. at 12a n.6, 17a.[28]

B. Decisions by the Coast Guard to Allocate Inspection Resources Should Not Be Given Weight in Determining Whether a Watercraft Is a "Vessel."

The U.S. Coast Guard has a variety of functions to perform with respect to vessels and navigable waters of the United States. Maintaining facilities for the documentation and mortgaging of vessels is only one of those functions. Others include oil spill prevention and remediation and the safety of life at sea and on navigable waters. In discharging these functions, the Coast Guard has been tasked to develop and apply standards in the design, construction, equi-

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[28] Similar references are made by Petitioner's supporting *amici* to state laws regarding floating homes or protecting homestead rights. *See* Floating Homes Associations' Br. at 22-29. None of these arguments has any place in establishing what is a vessel for purposes of Section 3 or admiralty jurisdiction.

page, manning, maintenance and operation of vessels on navigable waters. The Coast Guard's approach to watercraft is not always consistent, as the cases cited in the Gaming Association's *amicus* brief make clear. Gaming Ass'n Br. at 9-12. The documentation and mortgage recording protocols view craft as vessels in many cases when the Coast Guard marine inspection service considers craft as not requiring close inspection or intensive safety regulation. *See* Pet. Br. at 42; Gaming Ass'n Br. at 9-12 (describing level of Coast Guard regulation of *Boomtown Belle II* and other dockside casinos).

Several briefs have cited a five-factor "non-exclusive list of questions" announced by the Coast Guard in a 2009 Notice of Policy as part of a "totality of the circumstances" framework for its exercise of discretion in seeking to distinguish "vessels" that should be subjected to regulation and inspection from "permanently moored craft" that should be largely exempt from regulation. Pet. Br. at 42-43; US Br. at 2, 10, 27-29 (citing U.S. Coast Guard Notice of Policy, 74 Fed. Reg. at 21,814 (2009)).

The Notice of Policy purports to carry out this Court's ruling in *Stewart* by abolishing the category of "permanently moored vessels" and proceeds to set forth guidelines for its exercise of discretion and allocation of inspection and enforcement resources. This Notice of Policy certainly cannot form the basis of a constitutional or jurisdictional ruling by this Court. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 553 (1995) (Thomas, J., concurring) ("The dangers of a totality-of-the-circumstances approach to jurisdiction should be obvious. . . . Such a test . . . introduces undesirable uncertainty into the affairs of private actors—even

those involved in common maritime activities—who cannot predict whether or not their conduct may justify the exercise of admiralty jurisdiction."); *see also Sisson v. Ruby*, 497 U.S. 358, 368-75 (1990) (Scalia, J., concurring). Petitioner's floating home would not have satisfied these criteria in any event. *See* Resp. Br. at 34-36.

IV. PRINCIPLED APPLICATION OF THE DEFINITION OF "VESSEL" IN 1 U.S.C. § 3 NEED NOT RAISE FEDERALISM CONCERNS.

Petitioner and his supporting *amici* raise concerns that treatment of permanently or indefinitely moored structures as "vessels" threatens expansive involvement of federal jurisdiction in local and state matters. However, it is only by failing to recognize the distinction between a vessel under 1 U.S.C. § 3 and a "vessel in navigation" that Petitioner is able to conjure up his nightmare scenario, in which bartenders, roulette operators and nannies become "seamen" subject to federal admiralty jurisdiction. The fact that this concern about seaman status has been raised by *amici* such as the Gaming Association and the Floating Homes Associations proves yet again that the effect of consolidating 1 U.S.C. § 3 with the "in navigation" doctrine serves only to paint the parties and the courts into a doctrinal corner.

The federal government has admiralty jurisdiction over the navigable waters of the United States. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union."). The definition of "vessel," which underlies much of maritime law and the subjects of admiralty jurisdiction, cannot therefore be determined by state law as a constitu-

tional matter. Moreover, tailoring the definition of "vessel" to individual state laws would destroy uniformity.

CONCLUSION

The MLA respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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July 19, 2012

APPENDIX

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-1332A (REV. 9-80)

GENERAL INDEX OR ABSTRACT OF TITLE
CONTINUATION SHEET NO. 14

OFFICIAL NO.
1028319

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
SMTG	100	9-19-97	$115,000,000.0	97-97	154

FILED PORT	DATE	TIME	DATE TERMINATED
NEW ORLEANS, LA.	9-25-97	2:11 PM	----

GRANTOR
FIRST UNION BANK OF CONNECTICUT, TRUSTEE

GRANTEE
CASINO MAGIC OF LOUISIANA CORP.

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
BS	100	9-25-97	$1.00	97-97	155

FILED PORT	DATE	TIME	DATE TERMINATED
NEW ORLEANS, LA.	9-25-97	2:11 PM	----

GRANTOR
CASINO MAGIC OF LOUISIANA CORP.

GRANTEE
LOUISIANA-I GAMING, A LP

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GRANTEE

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DEPARTMENT OF TRANSPORTATION U.S. COAST GUARD CG-1332A (REV. 8-82)	GENERAL INDEX OR ABSTRACT OF TITLE CONTINUATION SHEET NO. 15	OFFICIAL NO. 1028319

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GRANTEE

**** VESSEL NAME CHANGED TO: BOOMTOWN BELLE II (10/21/97) ****

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U.S. COAST GUARD
CG-1333A (Rev. 8-87)

GENERAL INDEX OR ABSTRACT OF TITLE
CONTINUATION SHEET NO. 16

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GRANTOR
LOUISIANA-I GAMING, LP

GRANTEE
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
555 SOUTH FLOWER STREET, #3283, LOS ANGELES, CA 90071

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
AMPM	100	10 14 98	$375,000,000.00	98-98	583

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NVDC	11 05 98	11 34 AM	- - -

GRANTOR
LOUISIANA-I GAMING LP

GRANTEE
BANK OF AMERICA NATL TRUST AND SAVINGS ASSOC
555 SOUTH FLOWER ST #3283 LOS ANGELES CA 90071

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GRANTOR
LOUISIANA -I GAMING, LP

GRANTEE
REFERS TO BOOK # 98-80, PAGE # 32
BANK OF AMERICA, N.A. FORMERLY KNOWN AS BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOC

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GRANTOR

GRANTEE

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DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD CG - 1332	**GENERAL INDEX OR ABSTRACT OF TITLE** **Continuation Sheet No. 18**	Official No. 1028319

PREFERRED MORTGAGE

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 17, 2003	$300,000,000.00	BK 04-49	87

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December 18, 2003	12:25 PM	RECORDED

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BOOK 98-98 PAGE 583
BOOK 98-80 PAGE 32

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 15, 2003	$240,000,000.00	BK 04-61	695

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August 05, 2004	10:16 AM	RECORDED

GRANTOR:
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F/K/A BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

GRANTEE:
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% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	August 27, 2004	$400,000,000.00	283759	2615121

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September 01, 2004	11:15 AM	RECORDED

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% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 30, 2005	$750,000,000.00	445312	4755189

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January 10, 2006	10 30 AM	RECORDED

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100	November 14, 2006	$1,500,000,000.00	554870	6345197

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AMEND PREFERRED MORTGAGE

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July 24, 2009	04:20 PM	RECORDED

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LEHMAN COMMERCIAL PAPER INC

ASSIGNEE:

BARCLAYS BANK PLC
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NEW YORK NY 10166

MORTGAGOR:

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MORTGAGEE:

BARCLAYS BANK PLC

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DEPARTMENT OF HOMELAND SECURITY
U.S. COAST GUARD
CG - 1332

GENERAL INDEX OR ABSTRACT OF TITLE
Continuation Sheet No. 21

Official No.
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100 100	July 24, 2009	N.A. N.A.	702697	10805032

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LEHMAN COMMERCIAL PAPER INC

ASSIGNEE:
BARCLAYS BANK PLC
200 PARK AVENUE
NEW YORK NY 10166

MORTGAGOR:
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MORTGAGEE:
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LAYUPMAN

STANDARD CONTRACT FOR THE LAYING UP OF VESSELS

PART I

1 Place and date of Agreement (Cl. 2, 20)	2 Minimum contract period (state number of months from date of completion of de-activation) (Cl. 17(a), 17(f))
3 Owners (Cl. 1) (i) Name (ii) Place of registered office (iii) Law of registry	4 Managers (Cl. 1) (i) Name (ii) Place of registered office (iii) Law of registry
5 Technical Managers (i) Name (ii) Contact address	6 Vessel (Cl. 1 and Annex A) (ii) Name (iii) IMO Number IMO
7 Layup Site (state place or area (latitude/longitude)) (Cl. 1)	8 Notice of arrival at Layup Site (state number of hours notice) (Cl. 6)
9 Management Fee (state payment frequency and amount) (Cl. 11(a))	10 Managers' nominated account (Cl. 11(a))
11 Interest (state rate of interest to apply after due date to outstanding sums) (Cl. 5(a))	12 Managers' maximum liability (state amount) (Cl. 13(b))
13 Management fee on termination (state number of months to apply) (Cl. 17(h))	14 Dispute Resolution (state alternative Cl. 18(a), 18(b) or 18(c). If 18(c) agreed, place of arbitration must be stated) (Cl. 18)
15 Notices (state full style contact details for serving notice and communication to the Owners) (Cl. 19)	16 Notices (state full style contact details for serving notice and communication to the Managers) (Cl. 19)

Sample Copy

It is mutually agreed between the party stated in Box 3 and the party stated in Box 4 that this Agreement consisting of PART I and PART II as well as Annexes "A" (Vessel Description), "B" (Scope of Work), "C" (Additional Fees, Expenses and Optional Services), "D" (Protocols) and "E" (Associated Vessels) attached hereto, shall be performed subject to the conditions contained herein. In the event of a conflict of conditions, the provisions of PART I and Annexes "A", "B", "C", "D" and "E" shall prevail over those of PART II to the extent of such conflict but no further.

Signature(s) (Owners)	Signature(s) (Managers)

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PART II

LAYUPMAN

STANDARD CONTRACT FOR THE LAYING UP OF VESSELS

SECTION 1 – Basis of the Agreement

1. Definitions

In this Agreement save where the context otherwise requires, the following words and expressions shall have the meanings hereby assigned to them:

"De-activation" means the period of time during which the activities set out in Section 3 of Annex B (Scope of Work) are carried out.

"Flag State" means the State whose flag the Vessel is flying.

"Layup site" means the location stated in Box 7.

"Layup Period" means the period of time after De-activation and before Re-activation and includes the carrying out of activities set out in Section 4 of Annex B (Scope of Work).

"Managers" means the party providing Management Services as identified in Box 4.

"Management Services" means the services specified in Annex B (Scope of Work) for which the Managers are stated to be responsible therein, and all other functions performed by the Managers under the terms of this Agreement.

"Owners" means the party identified in Box 3.

"Re-activation" means the period of time during which the activities set out in Section 5 of Annex B (Scope of Work) are carried out.

"Vessel" means the vessel named in Box 6 details of which are set out in Annex A (Vessel Details) attached hereto.

2. Commencement and Appointment

With effect from the date of this Agreement stated in Box 1 and continuing until and unless terminated as provided herein, the Owners hereby appoint the Managers and the Managers hereby agree to act as the Managers of the Vessel in respect of the Management Services.

3. Authority of the Managers

Subject to the terms and conditions herein provided, during the period of this Agreement, the Managers shall carry out the Management Services in respect of the Vessel as agents for and on behalf of the Owners. The Managers shall have authority to take such actions as they may from time to time in their absolute discretion consider to be necessary to enable them to fulfill their obligations under this Agreement.

SECTION 2 – Obligations

4. Managers' Obligations

The Managers shall:

(a) use their best endeavours to perform the Management Services in accordance with sound layup industry practice, including but not limited to compliance with all relevant rules and regulations, and protection of the Vessel and surrounding environment in the case of emergency. The Managers shall have in place and maintain an emergency response plan. The Managers shall waive their right to claim any award for salvage performed on the Vessel and/or to protect the

environment. The performance of the Management Services shall be conducted in a manner consistent with appropriate social responsibility;

(b) maintain records of work carried out in performance of the Management Services;

(c) provide periodic written reports to the Owners of the observed condition of the Vessel and its equipment and machinery in a form and frequency agreed between the parties; and

(d) notify the Owners in the event that, during the performance of the Management Services, the Managers become aware of any equipment or machinery (for which the Managers are not responsible under Annex B (Scope of Work)) that needs maintenances and/or repair.

In the performance of their management responsibilities under this Agreement, the Managers shall be entitled to have regard to their overall responsibility in relation to all vessels as may from time to time be entrusted to their management. In particular, but without prejudice to the generality of the foregoing, the Managers shall be entitled to allocate available supplies, manpower and services in such manner as in the prevailing circumstances the Managers in their absolute discretion consider to be fair and reasonable.

5. Owners' Obligations

The Owners shall:

(a) pay all sums due to the Managers punctually in accordance with the terms of this Agreement. In the event of payment after the due date of any outstanding sums the Manager shall be entitled to charge interest at the rate stated in Box 11;

(b) use their best endeavours to perform those items in Annex B (Scope of Work) for which the Owners are stated to be responsible therein;

(c) maintain records of work carried out in performance of their obligations under Annex B (Scope of Work);

(d) advise the Managers of any change of flag or classification society of the Vessel whereupon either party may request an adjustment of the Management Fee (see Clause 11(a)) to reflect any increase of decrease in cost of providing Management Services as a consequence of such change. If agreement cannot be reached then either party may terminate this Agreement in accordance with Sub-clause 17(f);

(e) ensure that, throughout the Layup Period, the Vessel is in possession of valid certificates to comply with the requirements of the port authority, Flag State or classification society; and

(f) ensure that the minimum crew required by the Flag State is maintained until delivery into layup.

SECTION 3 – Operation

6. Arrival and De-activation

(a) Not later than seventy-two (72) hours or the number of hours stated in Box 8 before the Vessel's arrival off the Layup Site, the Owner shall give notice to the Managers. Upon arrival at the Layup Site the Managers shall attend on board the Vessel and carry out a joint inspection with the Owners to establish that the Vessel is in the condition stated in Annex B (Scope of Work).

(b) The de-activation of the Vessel shall be carried out in accordance with Annex B (Scope of Work).

During the period of de-activation the Owners and Managers shall be responsible respectively for those tasks allocated to them in Annex B (Scope of Work), and the Vessel shall be moved to the Layup Site. Owners shall remain responsible for the navigation of the vessel until completion of De-activation.

(c) The Owners and the Managers shall agree a down-manning plan upon the Vessel's arrival at the Layup Site.

(d) On commencement and again on completion of de-activation a Protocol in the form attached to Annex D (Protocols) shall be signed by both parties. On completion of De-activation the Managers shall take delivery of the Vessel into layup.

7. Layup Period

The Managers shall carry out the services identified in Annex B (Scope of Work) in relation to the Layup Period.

8. Inspection of Vessel

The Owners may at any time after giving reasonable notice to the Managers inspect the Vessel for any reason they consider necessary.

9. Re-activation and Removal of the Vessel from Layup

(a) At the time the expiry date of this Agreement becomes known (see Clause 17 (Termination)), the process of Re-activation set out in Annex B (Scope of Work) shall be commenced in such a way as to enable Re-activation to be completed by the expiry date. During the period of Re-activation the Owners and Managers shall be responsible re-

spectively for those tasks allocated to them in Annex B (Scope of Work).

On commencement and again on completion of Re-activation a protocol in the form attached to Annex D (Protocols) shall be signed by both parties.

(b) The Owners and the Managers shall agree an up-manning plan prior to Re-activation.

(c) In the event that the Vessel:

(i) Can be re-activated prior to the expiry date of this Agreement, the Owners shall take over responsibility for the Vessel not later than such date;

(ii) Cannot be re-activated prior to the expiry date of this Agreement then the party responsible for the tasks that are preventing completion of Re-activation shall complete those tasks as expeditiously as possible and the terms of this Agreement shall continue to apply.

(d) On completion of Re-activation the Owners shall take over responsibility for the Vessel and remove it from the Layup Site. If the Owners for any reason within their control fail expeditiously to carry out their obligations in accordance with Annex B (Scope of Work) in respect of Re-activation or upon Re-activation fail to remove the Vessel from the Layup Site, the Managers shall be entitled to recover such losses as they may suffer from the Owners. The Managers shall also have a lien over the Vessel and shall have the right but not the obligation to remove the Vessel to a safe place.

(e) In the event that Re-activation under this Agreement is not required, the process for removal of the Vessel from the Layup Site shall be agreed between the parties, and on completion of that process a Protocol in the form attached to Annex D (Protocols) shall be signed by both parties and the Owners shall take delivery of the Vessel out of layup. In the event the Owners fail to take delivery of the Vessel and remove it from the Layup Site, the Managers shall be entitled to recover such losses as they may suffer from the Owners and shall have a lien over the Vessel and shall have the right but not the obligation to remove the Vessel to a safe place.

APPENDIX C

RULES FOR

SURVEY AFTER CONSTRUCTION

2012

PART 7

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PART 7
APPENDIX

SECTION 3 Guide for Lay-up and for Reactivation of Laid-up Ships

1 Guide for Lay-up of Ships (12 June 2009)

When requested by the Owner, ABS will undertake to review, survey, and confirm by issuance of a factual Lay-up Report, the actions taken to preserve and protect a vessel in lay-up. Outlined below are precautions and procedures suggested to accomplish this objective, however, it is recognized that there may be a variety of equally satisfactory approaches to accomplish the same objective.

Approval Procedure for LAID UP Additional Notation

An ABS optional notation, LAID UP, for Laid-up Ships, may be assigned to a vessel in full compliance with the requirements as specified in this Appendix.

Specific elements required for LAID UP notation include the following:

i) Preparation and submission of plans to the ABS Divisional survey office as noted in 7-A-3/1.1.3(a).

ii) Lay-up survey

iii) Annual lay-up confirmatory survey to be conducted in lieu of the Annual Survey – Hull:

a) Hull integrity

b) Review of vessel maintenance and preservation record

c) General examination

iv) A survey report will be issued with details of vessel lay-up status.

1.1 Lay-up Surveys

1.1.1

When ABS is notified by the Owner that a vessel has been laid-up, this status will be noted in the vessel's survey status and in the *Record*, and surveys falling due during lay-up may then be held in abeyance until the vessel reactivates, at which time they are to be brought up-to-date.

1.1.2 (*12 June 2009*)

Vessels which have been laid up and are returning to active service, regardless of whether ABS has been previously informed that the vessel has been in lay-up, a Reactivation Survey is required. The requirements for the Reactivation Survey are to be specially considered in each case, having due regard being given to the status of surveys at the time of the commencement of lay-up, the length of the lay-up period and the conditions under which the vessel has been maintained during that period.

1.1.3 (*2011*)

Where the initial lay-up preparations and procedures have been submitted to ABS for review and survey, and re-verified annually by survey, consideration may be given to deduct-

ing part or all of the time in lay-up from the progression of survey intervals, or to modifying the requirements for updating surveys at the time of reactivation. This consideration is not applicable to vessels in the Enhanced Survey Program (ESP) and the Expanded Survey Program for Dry Cargo Vessels (ESDC).

1.1.3(a) When lay-up specification procedures are submitted, they shall include the following details:

- Lay-up site details (location, access, meteorological data, currents and tides)
- Proposed period for lay-up
- Mooring and anchoring arrangements considering the most severe tidal changes, wind strength and direction, including provisions for clearing the anchor chain of twists
- Fendering and gangways
- Ballast requirements
- Communications with shore services
- Proposed manning
- Power availability and other services
- Fire prevention, fire fighting, flooding and securing arrangements
- Preservation of cargo gear
- Back-up, preservation or removal/storage of electronic equipment
- Preservation of hull, tanks, and cathodic protection

- Procedures for preservation and maintenance of equipment
- Use of dehumidification equipment
- Gas free certificates to be issued and maintained
- Reactivation plan
- Record of spare parts removed from the laid up vessel

A log book with record of lay-up preparations, maintenance, and preservation actions should be maintained throughout the vessel's lay-up and reactivation. Machinery space humidity levels should be recorded on a regular basis during the lay-up period, together with scheduled equipment maintenance and operation.

1.1.4 (*12 June 2009*)

Flag administrations may have specific regulations for lay-up and reactivation surveys, and should be contacted for additional requirements.

. . .

3 Guide for Reactivation of Laid-up Ships

(*12 June 2009*) For vessels returning to active service from lay-up, regardless of whether ABS has been informed that the vessel has been in lay-up or lay-up preparations reviewed by ABS, a Reactivation Survey is required. An ABS office should be contacted for details of the requirements. Outlined below are guidelines on such surveys.

3.1 Reactivation Survey Status

3.1.1

In order to restore a laid-up vessel to active Class status, a Reactivation Survey is to be carried out including a corresponding point-by-point coverage of the original lay-up items. The extent of the Reactivation Survey is generally dependent on the length of the lay-up, the lay-up procedures followed, and the maintenance conditions during lay-up. However, the equivalent of an Annual Survey for all Class items, up-dating any due surveys and compliance with any outstanding recommendations are normally required.

3.1.2 (*12 June 2009*)

The primary objective of the Reactivation Survey is to verify that the vessel is in conformance with the applicable class Rules and requirements. Where the lay-up preparations and procedures were submitted to ABS for review and verified by survey at time of lay-up and annually thereafter, consideration may be given to deducting part or all of the time in lay-up from the progression of survey intervals, or to modifying the requirements for up-dating surveys at time of reactivation.

3.1.3 (*12 June 2009*)

Applicable items of the Reactivation Survey may be credited to a forth coming [sic] Special Periodical Survey, provided that the entire Special Periodical Survey is completed within a period of approximately fifteen months, or

the Special Periodical Survey is on continuous basis.

3.3 Reactivation – Hull and Outfit

3.3.1 (*12 June 2009*)

Drydocking Survey – Dependent upon the date of the last Drydocking Survey and the period and conditions of lay-up, an underwater inspection by diver may be permitted in lieu of drydocking for reactivation. In such cases, cleaning of vessel's underwater body, including sea suctions, may be required. Where it is intended to proceed from the lay-up site to another location for drydocking, an underwater inspection by diver will normally be required prior to departing the lay-up site.

3.3.2

The following additional items should normally be included in the reactivation surveys of hull and outfitting:

- Anchors and chain cables, chain stoppers and chain locker pumping arrangements
- Anchor windlass, mooring winches and roller fairleads
- Cargo holds and machinery space drain wells together with bilge pumping arrangements and hull penetrations
- Random cargo tanks, pump rooms, cargo piping and associated valves and pumping arrangements
- Watertight doors, engine room skylights, fire dampers, ventilators, portlights, hatch covers and their respective closing devices

- Peak tanks, random ballast tanks and their respective pumping systems
- Cofferdams and voids, together with their pumping out arrangements
- General examination and testing of ship's whistle, internal communication systems, engine order telegraph, steering arrangements and controls, general alarm system, rudder angle indicator and navigational lights
- Examination and servicing as necessary of ship's radio installation, radio direction finder, gyro-compass and repeaters, magnetic compasses, depth sounder, radar and other navigational aids
- Fire extinguishing arrangements to be verified in order
- (*12 June 2009*) Foam tank solution to be tested and replaced as necessary
- Tank venting arrangements including closing devices, pressure-vacuum relief valves and flame arrestors to be examined and placed in order as required

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 15 2012
OFFICE OF THE CLERK

No. 11-626

IN THE
Supreme Court of the United States

Fane Lozman,

Petitioner,

v.

The City of Riviera Beach, Florida,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF MARITIME LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF MARITIME LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici Curiae respectfully submit this brief in support of Petitioner Fane Lozman pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are scholars who have studied, taught, practiced, and published extensively in the field of admiralty and international law. This case presents a key element for determining the parameters of admiralty law and jurisdiction-- the definition of a "vessel." The knowledge held by each *amicus* as a result of their devotion to this area of law will be critical in helping the Court to determine the outcome of this matter.

Professor Thomas J. Schoenbaum was the Dean Rusk Professor Emeritus of the University of Georgia and has now taken a post as Research Professor of Law at George Washington University. Professor Schoenbaum was the founding Director of the Tulane Admiralty Law Center, where he served from 1980 to 1983. He was also the author of the treatise, Admiralty and Maritime Law, 5th ed. 2011, published by Westgroup.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

Professor Steven F. Friedell teaches courses on admiralty, torts and Jewish law at the Rutgers University School of Law. In 1996, he served as chair of the AALS Section on Maritime Law and was on the executive committee from 1997 to 2001. He is the author of volume 1 of Benedict on Admiralty (Jurisdiction), a co-author along with David Robertson and Michael Sturley of a casebook on Admiralty, and has written extensively on Admiralty law. Professor Friedell is a member of the Editorial Board of the Journal of Maritime Law and Commerce, and is a member of the American Law Institute and of its members consultative group, Liability for Economic Loss.

Captain Alan S. Richard is an Adjunct Professor at Florida State University School of Law. He retired as a Captain from the Division of Law Enforcement for the Florida Fish and Wildlife Commission after 32 years of maritime law enforcement service. His teaching focus is on Admiralty Law, a topic on which he has published and lectured extensively. He is a member and past chair of the Admiralty Law Committee of the Florida Bar, a member and director of the Southeastern Admiralty Law Institute, and a member of the Admiralty and Maritime Law Network, the Maritime Accident Investigation Group, and the National Association of State Boating Law Administrators. He has been licensed by the United States Coast Guard to serve as Master of Steam or Motor Vessels and is presently serving as a member of the Coast Guard's Navigation Safety Advisory Council.

SUMMARY OF ARGUMENT

Amici respectfully urge the Court to hold that floating structures that are intentionally and indefinitely moored, that are used in the manner of structures on fast land, that are not used for transportation on the water, and that will not be so used for the foreseeable future are not vessels within the meaning of 1 U.S.C. § 3 or the General Maritime Law of the United States.

In enacting Section 3, Congress intended to codify the judicially established understanding of the term "vessel" under the General Maritime Law. Maritime law is, and at the time of the enactment of Section 3 was, a special field of jurisprudence, created for special reasons. Fundamentally, the special grant of admiralty jurisdiction to the federal courts seeks to provide uniform rules of law for the business of shipping, to facilitate maritime commerce, and to apply uniform remedies for persons traveling or working on navigable waters in connection with these maritime activities.

The application of admiralty law and jurisdiction entails a special set of substantive rules. These rules are specifically designed to facilitate the movement of maritime commerce across state and national boundaries. At its core, admiralty law consists of a uniform body of federal law. Typically, the substantive law applied in admiralty cases is federal maritime law—a body of law distinct from state law and the common law.

In addition to special substantive rules, maritime law entails certain practical procedural consequences. These include, among others, limited availability of the right to trial by jury; application of the special procedures for the arrest and attachment of maritime property under the Supplemental Rules. These procedures provide powerful tools which inherently also contain the potential for

misuse when applied to persons or things not appropriately within maritime jurisdiction.

In reflecting the general maritime law codified in 1 U.S.C. §3, therefore, amici respectfully urge that the definition of "vessel" reflect these principal considerations: (1) the functional reasons for applying admiralty law to particular subjects of interstate and international commerce; (2) the adequacy of state law in addressing those subjects; and, conversely, (3) the intended and unintended consequences of applying admiralty law.

In light of these considerations, indefinitely moored structures should not be treated as vessels. There are no significant functional reasons for displacing state law with federal admiralty law in adjudicating legal issues pertaining to dispute between the City of Rivera Beach and Mr. Lozman regarding Lozman's floating house. State law is adequate to address the legal issues associated with Lozman's floating house.

In light of the special nature of maritime law, the test for determining whether a floating structure qualifies as a "vessel" should remain focused on functional considerations in order to vindicate the special purpose of admiralty and maritime jurisdiction. By analogy, in the context of the Jones Act, the Court has determined that land-based workers are not seamen. *Chandris Inc. v. Latsis*, 515 U.S. 347 (1995). Just as there is no significant federal interest in providing rules of decision for land-based workers, so also, there is no significant federal interest in providing a uniform body of federal maritime law to determine landlord-tenant relations for floating houses.

For the reasons explained below, treating indefinitely moored structures as "vessels" would erode

federalism and have other adverse unintended consequences. For example, treating indefinitely moored structures as "vessels" would sweep within the reach of admiralty law and jurisdiction an inappropriate array of fixed structures. Extending admiralty jurisdiction to encompass Lozman's floating house would impinge on matters that are primarily those of state concern. State law is adequate to address the competing interests of landlord and tenant.

Applying admiralty law to indefinitely moored structures such as Lozman's floating house would also tend unnecessarily to broaden the reach of admiralty law. The inevitable result of such an expansion would be to erode federalism and the right to trial by jury, while also expanding special admiralty procedures not meant for adjudicating issues associated with floating houses and other structures not used for transportation.

ARGUMENT

I. Indefinitely Moored Floating Structures Are Not Vessels Under 1 U.S.C. §3 and Related Federal Maritime Statutes.

A. Congress Intended that Section 3 Codify the Judicially Established Understanding of the Term "Vessel" Under the General Maritime Law.

Because "Section 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law," it should be construed "in light of the term [vessel's] established meaning in general maritime law." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490, 492 (2005). "There is no legally significant difference between the statutory

definition of the term 'vessel" and the meaning attributed to it by the general maritime law as obtaining in this country." Steven F. Friedell, 1 *Benedict on Admiralty* §1-2 (7th ed. rev. 1997).

To assist in determining legislative intent, the Court has previously surveyed decisions of the lower courts at and around the time of Congress' enactment of 1 U.S.C. §3. *See Stewart*, 543 U.S. at 490-91 (surveying lower court decisions around the time of Section 3's enactment to discern the statute's meaning). Numerous decisions at that time focus on the actual purpose of the structure, as being fairly engaged in maritime commerce or navigation.

The general maritime law at the time of enactment of Section 3 was firmly rooted in an understanding of the nature and function of maritime law and jurisdiction. The leading admiralty treatise at the time of Section 3's enactment, *Benedict on Admiralty*, analyzed maritime law and jurisdiction within the context of the historical reasons and purposes for this special body of jurisprudence. Reflecting these functional considerations, he explained that "[i]t is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes [maritime] jurisdiction, but the *purpose and business of the craft*, as an instrument of naval transportation." Erastus Cornelius Benedict, *The American Admiralty, its Jurisdiction and Practice* § 218 (2d ed. 1870) (emphasis added). Benedict also stated that "[S]HIP is a general term, and in the law is equivalent to *vessel*," and defined a ship as "a locomotive machine adapted to transportation over rivers, seas and oceans." *Id.* § 215. *Cf. The Rock Island Bridge*, 73 U.S. 213, 216 (1867) (railroad bridge could not be subject to a maritime lien, since"[a] maritime lien can only exist upon movable things engaged in navigation, or upon things which are

the subjects of commerce on the high seas or navigable waters.") Historically, "the terms ship and vessel are used interchangeably as synonymous terms, connoting a craft capable of being used for transportation on oceans, rivers, seas, and navigable water." Friedell, 1 *Benedict on Admiralty* §162.

B. Maritime Law Is a Special Body of Jurisprudence Aimed at Protecting a Special Federal Interest, Namely, Facilitating Maritime Commerce Through a Uniform Body of Federal Law and Distinctive Federal Jurisdiction.

Maritime law is, and at the time of the enactment of Section 3 was, a special field of jurisprudence, created for special reasons. "The purpose of the special grant of admiralty jurisdiction to the federal courts... is to provide uniform rules of law for the business of shipping, to facilitate maritime commerce, and to apply uniform remedies for persons traveling or working on navigable waters in connection with these maritime activities." Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-2 (5th ed. 2012).

The application of admiralty law and jurisdiction entails a special set of substantive rules. *See generally id.* These rules are specifically designed to facilitate the movement of maritime commerce across state and national boundaries. *See id.* The development of maritime law has thus been historically tied to sea trade. Friedell, 1 *Benedict on Admiralty* §1-2.

At its core, admiralty law consists of a uniform body of federal law. *The Lottawana*, 88 U.S. (21 Wall.) 558, 575 (1874). "The substantive law applicable in admiralty cases is, in general, the federal maritime law, which in many respects is distinct from state law and the common

law." *See generally* Schoenbaum §1-2. A key purpose of the grant of admiralty and maritime jurisdiction under Article III, §2 of the Constitution was to ensure the essential uniformity of maritime law, consistent with international rules of the sea, that "would supersede the numerous conflicting and changing rules that could not fail to result from the varying legislation and adjudication of the States." Friedell, 1 *Benedict on Admiralty* §105. "Although the lines are not always easy to draw, it would likely lead to more satisfactory results if courts recognized that the purpose of having jurisdiction over maritime affairs is to provide a forum for developing a uniform body of law for those aspects of maritime commerce for which there is a substantial federal interest."*Id.*

Federal maritime law springs primarily from the General Maritime Law, "a body of concepts, principles and rules, originally customary and international in origin, that have been adopted and expounded over time by the federal courts." Schoenbaum §2-1. Over time, federal statutes and international agreements have supplemented and expanded the General Maritime Law, together with "State law (insofar as appropriate in the admiralty context)", where needed to fill in the interstices of maritime law and to avoid gaps or "lacunae." *See id.* The admiralty and maritime jurisdiction of the U.S. has historically not been limited by the restraining statutes in English admiralty practice, and "is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdictions in other countries constituting the maritime commercial world as well as the jurisdiction in England." Friedell, 1 *Benedict on Admiralty* §104.

In addition to special substantive rules, maritime law entails certain practical procedural consequences. These include, among others, limited availability of the right to trial by jury; application of the special procedures for the arrest and attachment of maritime property under the Supplemental Rules, including authorization for "special *in rem* process, which permits seizure without a hearing and before judgment by *ex parte* order of the court"; the right to interlocutory appeal; the right to petition for limitation of liability and to obtain a federal injunctive relief requiring that claims be filed in a single, unified concursus; and a host of other procedures specially designed to facilitate maritime commerce. *See generally* Schoenbaum, §1-2. These procedures provide powerful tools which inherently also contain the potential for misuse when applied to persons or things not appropriately within maritime jurisdiction.

Amici recognize the vital importance of the grant of admiralty and maritime jurisdiction to the federal judiciary under Article III, §2 of the Constitution. The rules and customs of the sea extend back to the very beginnings of maritime commerce. Friedell, 1 *Benedict on Admiralty* §1-2. Even the Code of Hammurabi recorded laws of the sea. *Id.* These rules and customs have influenced the development of not only our system of law, but also our cultural heritage and values. *See generally* Robert M. Jarvis *et al.* "Admiralty Law in Popular Culture," 31 J. Mar. L & Comm. 519-661 (2000) (series of articles on influence of admiralty law on human culture). It is precisely in order to protect and maintain its continuing vitality that maritime law should not be diluted, let alone perverted, by overextension to deal with subjects and issues that do not implicate the historical goals and underpinnings of admiralty jurisprudence.

In reflecting the general maritime law codified in 1 U.S.C. §3, therefore, *amici* respectfully urge that the definition of "vessel" reflect these principal considerations: (1) the functional reasons for applying admiralty law to particular subjects of interstate and international commerce; (2) the adequacy of state law in addressing those subjects; and, conversely, (3) the intended and unintended consequences of applying admiralty law.

C. Indefinitely Moored Structures Should Not Be Treated As Vessels.

Indefinitely moored floating structures are more-or-less permanent extensions of the shore that do not implicate the essential objectives or purposes of displacing state law with federal maritime law. There are no significant functional reasons for displacing state law with federal admiralty law in adjudicating legal issues pertaining to dispute between the City of Rivera Beach and Mr. Lozman regarding Lozman's floating house. State law is adequate to address the legal issues associated with Lozman's floating house.

There is no federal statute governing landlord-tenant relations within the states for good reason. There is no significant federal interest in providing a uniform body of federal law to govern those relations. Just as there is no significant federal interest in displacing state law governing landlord-tenant relations with a uniform body of federal law, there is also no significant federal interest in displacing state law and jurisdiction over indefinitely moored residential structures.

Indefinitely moored structures should not be deemed vessels because of the mere fact that such structures can be, and occasionally are, towed across water. The mere ability to tow something does not sufficiently engage the

underlying purposes of admiralty jurisdiction to treat everything involving the structure when it is moored as a matter of maritime concern. *See* George Rutherglen, *Dead Ships*, 30 J. of Mar. L. & Com. 677, 682 (1999) ("Anything can be towed, provided that it can float. The fact that it is sufficiently seaworthy to be towed does not make it a vessel.").

In light of the special nature of maritime law, the test for determining whether a floating structure qualifies as a "vessel" should remain focused on functional considerations in order to vindicate the special purpose of admiralty and maritime jurisdiction. *Compare* Schoenbaum, §1-6 ("The business or employment of a watercraft is determinative, rather than its size, form, capacity or means of propulsion.") *with* Friedell, 1 *Benedict on Admiralty* §164 ("It is not the form, the construction, the rig, the equipment, or means of propulsion that establishes the jurisdiction, but the purpose and business of the craft as an instrument of maritime transportation.")

By analogy, in the context of the Jones Act, the Court has determined that land-based workers are not seamen. *Chandris Inc. v. Latsis*, 515 U.S. 347 (1995). Just as there is no significant federal interest in providing rules of decision for land-based workers, so also, there is no significant federal interest in providing a uniform body of federal maritime law to determine landlord-tenant relations for floating houses.

This Court has rejected "a 'snapshot' test for seaman status" *Chandris*, 515 U.S. at 363, and *amici* are not suggesting that such a test be employed for vessel status. This Court has repeatedly reaffirmed its belief that "it is important to avoid engrafting upon the statutory classification of a seaman a judicial gloss so protean,

elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Chandris*, 515 U.S. at 363 (internal quotation marks omitted); *see also Barrett v. Chevron, U.S.A., Inc.*, 781 F. 2d 1067, 1075 (5th Cir. 1986); *Longmire v. Sea Drilling Corp.*, 610 F. 2d 1342, 1347, n. 6 (5th Cir. 1980).]

Amici are not asserting that Lozman's house should float into and out of vessel status based on the circumstances as they exist at any particular instant. Nevertheless, "just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea," *Chandris*, 515 U.S. at 372, Lozman's floating house should not be accorded vessel status simply on the basis that, on prior occasions, it had been towed from one point to another without breaking up or sinking. As a seaman may lose that status upon being assigned indefinitely to duties ashore with no intent for him to ever return to sea, so may a vessel lose its status as such upon being attached indefinitely to the shore or an extension thereof with no intent for it to ever leave.

More important, a land-based worker does not attain seaman status upon occasionally receiving a work assignment aboard a vessel as distinguished from an assignment "that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel." *Chandris*, 515 U.S. at 372. Similarly, a floating structure such as Lozman's floating house should not attain vessel status based on occasional, intermittent movement on the water. Although the purpose for which it was built may not be the deciding factor in such an analysis, the purpose for which it is used, and especially the purpose which it will

be used for the indefinitely foreseeable future, should certainly be considered in determining its status. Under this Court's precedents, "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." *Chandris*, 515 U.S. at 373 quoting *DiGiovanni v. Traylor Bros., Inc.*, 959 F. 2d 1119, 1121 (1st Cir.), cert. denied, 506 U.S. 827, 113 S. Ct. 87, 121 L. Ed. 2d 50 (1992). Similarly, a shore-based floating structure does not become a vessel simply because it is physically possible to tow it from one point to another.

For one and one-half centuries, this Court's jurisprudence has made it clear that structures that are indefinitely moored and that function as extensions of land are excluded from the status of being vessels. *Amici* respectfully urge that the Court clarify its intent to follow that long-established precedent and hold, as a matter of law, that Lozman's floating house did not fall within the definition of "vessel" in 1 U.S.C. § 3.

II. Treating Indefinitely Moored Structures As "Vessels" Would Erode Federalism and Have Other Adverse Unintended Consequences.

A. Treating Indefinitely Moored Structures As "Vessels" Would Sweep Within the Reach of Admiralty Law and Jurisdiction an Inappropriate Array of Fixed Structures.

Section 3 of title 1 sets forth a default definition of "vessel." It provides the predicate for a panoply of substantive maritime statutes. "The definition of a 'vessel' is important in many different contexts of admiralty and maritime law. Vessel status is important in determining jurisdiction since acts that occur aboard a vessel will be presumed, absent unusual circumstances, to meet the maritime relationship requirement. Furthermore, under the Admiralty Extension Act, land-based damages are

within the jurisdiction if 'caused by a vessel.' The existence of a vessel may also be necessary for the assertion of a salvage award, liability for unseaworthiness, or a maritime lien under the general maritime law. The applicability of several statutes, such as the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Limitation of Shipowners Liability Act, and the Outer Continental Shelf Lands Act, may depend on whether a vessel is involved." Shoenbaum §1-6 (footnotes omitted).

For this reason, this Court has instructed that Section 3 cannot "sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 494 (2005). The decision of the Eleventh Circuit below that "capability" means that anything that can be towed without sinking is a vessel, Pet. App. 21a, would bring within the ambit of admiralty law and jurisdiction innumerable floating structures having nothing to do with the functional reasons for admiralty jurisprudence. It would be absurdly overbroad to treat every floating structure that is capable of being towed as a "vessel" for purposes of admiralty jurisdiction and law. Any pedant could easily identify thousands of floating structures that are capable of being towed that have nothing to do with the functional reasons for admiralty jurisdiction and maritime law. Extending the reach of maritime law and jurisdiction to encompass such items would not advance the purpose of admiralty. It would only erode the core principle of federalism and the right to trial by jury.

Extending admiralty jurisdiction to encompass Lozman's floating house would impinge on matters that are primarily those of state concern. For example, state

law is adequate to address the competing interests of landlord and tenant. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."). By its nature, the relationship of landlord-tenant arises out of a land-based relationship. A significant number of states have enacted statutes governing landlord-tenant relations. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) ("[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."). These statutes implement the basic public policies within the individual states determined by the people of the states through their elected representatives. *See Herian v. U.S.*, 363 F. Supp. 287, 290 (D.C.D.C., 1973) ("Landlord and tenant cases are uniquely local."). Those public policies may appropriately vary from state-to-state, depending on the degree of urbanization within each state; the availability of courts and other resources to decide disputes; the degree of sophistication of landlords and tenants in each state; the past traditions and history of such relations within each state; *etc. See generally U.S. v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 591-92 (1973) ("Even when federal general law was in its heyday, an exception was carved out for local laws of real property.).

Under these circumstances, the term "capability" for transportation in 1 U.S.C. § 3 should be interpreted in light of the functional reasons for admiralty law and jurisdiction. Section 3 brings within its ambit structures

purposefully designed or actually used for transportation. It does not extend to indefinitely moored floating structures with little more than a theoretical capability for transportation.

The nature and purpose of floating structures already vary widely. No doubt, with innovations in materials science, structuring engineering and computer-assisted design, many currently unheard of types of floating structures will be created in the future. Future radical changes in design and construction for many sorts of floating structures are inevitable. Treating floating structures as "vessels" under Section 3 makes sense only when the federal interest in protecting maritime commerce requires displacement of state law and jurisdiction with federal maritime law and jurisdiction.

Applying admiralty law to indefinitely moored structures such as Lozman's floating house would tend unnecessarily to broaden the reach of admiralty law. The inevitable result of such an expansion would be to erode federalism and the right to trial by jury, while also expanding special admiralty procedures not meant for adjudicating issues associated with floating houses and other structures not used for transportation.

B. Imposing "Vessel" Status on Fixed Structures that Happen to Float Would Improperly Subject Them to Maritime Regulations and Liens.

Surely, Congress had no intention to extend federal admiralty jurisdiction and regulation to a broad array of items having nothing to do with maritime commerce or travel by water. Every vessel on the navigable waters of the United States must be equipped with specified items of safety equipment, including for example, life jackets. 33 C.F.R. § 175.15, 46 C.F.R. 25.25-5. Vessels, even

homemade boats, must be built to federal specifications that specifically preempt state and local regulation. See, e.g., 46 U.S.C. § 4306. To enforce those regulations, the Coast Guard's "commissioned, warrant, and petty officers may *at any time go on board of any vessel* subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and *examine, inspect, and search the vessel* and use all necessary force to compel compliance. 14 U.S.C. § 89 (emphasis added).

Because of this "heavy overlay of maritime law and the long practice of regulatory stops, inspections and searches by these officers," *United States v. Whitmire*, 595 F. 2d 1303,1313 (11th Cir. 1979), the expectation of privacy aboard a vessel is significantly limited. United States v. Williams, 617 F. 2d 1063, 1087 (5th Cir. 1980). Neither a warrant nor even articulable suspicion of a violation is necessary for such a boarding or inspection. *United States v. Warren*, 578 F.2d 1058, 1067-70 (5th Cir. 1978); *United States v. Freeman*, 579 F.2d 942, 945 (5th Cir. 1978).

Moreover, vessels are subject to maritime liens under the Federal Maritime Lien Act, 46 U.S.C. § 31342, and the general maritime law. Should floating houses be treated as vessels, every painter, roofer, electrician, plumber and other service provider may potentially be required to add a layer of federal maritime lien law to his existing practices under state law. Because contracts for these services to vessels are maritime, each may have to create a whole new set of invoice forms and contractual provisions to suit this additional new area of federal regulation. *See generally* Schoenbaum, §1-10. Owners of such structures, in turn, may be required to replace their existing homeowners or business insurance with marine

insurance—with its peculiar provisions and requirements. *See* Leslie J. Buglass, *Marine Insurance Claims American Law and Practice*, 1-6 (2nd ed. 1972). The federal courts will be required to adjudicate the potential federal or state status of any service and any person connected with such structures. Other than providing an economic stimulus for hundreds of maritime lawyers, this intrusive extension of federal power and regulation is not calculated to serve any significant federal interest in facilitating maritime commerce.

III. Indefinitely Moored Floating Structures Are Not "Vessels" Under Controlling Supreme Court Precedents.

Focusing on the functional relationship of floating structures to the purpose of admiralty law and jurisdiction, the Court has held on two occasions that indefinitely moored structures never intended for moving people or things across water are not vessels. *Compare Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 626-27 (1887) (dry-dock was not a vessel because it was "not used for the purpose of navigation" – that is, for "locomotion from one place to another.") *with Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 21-22 (1926) (wharfboat was not a vessel, as it "was not practically capable of being used as a means of transportation"; "was not used to carry freight from one place to another"; its purpose was to function as a stationary "office, warehouse, and wharf"; and it "performed no function that might not have been performed as well by an appropriate structure on land.")

Even a structure that was once a vessel loses its vessel status if it is indefinitely moored. Although such structures may have initially been designed for transporting people or things over water, they cease to be

vessels if they are no longer engaged in such a purpose. *See Roper v. United States*, 368 U.S. 20 23-24 (1961) (deactivated military ship converted into a floating grain warehouse, that was capable of being towed, was not a vessel in navigation as it was not "moved in order to transport commodities from one location to another" and "served as a mobile warehouse which was filled and then moved ... to perform its function of storing grain until needed, at which time it was returned and unloaded.").

Similarly, the Court's decision in *Stewart* focused on the practical, rather than theoretical, capability of a floating structure in determining vessel status: the test is whether it is *"practically capable of maritime transportation*, regardless of its primary purpose." 543 U.S. at 497 (emphasis added). Even though the dredge in question was not "used *primarily* for th[e] purpose" of transportation, it was a vessel because *one* of its purposes was to move people and equipment over water. Hence, the critical inquiry for vessel status remains "whether [the structure's] use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." 543 U.S. at 496.

Thus, despite the "remote possibility that they may one day sail again," structures that were previously vessels "may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Stewart*, 543 U.S. at 494, 496. The loss of vessel status continues even if the vessel "is taken out of service indefinitely; it need not be removed from service forever." Rutherglen, 30 Mar. L. & Com. at 679.

CONCLUSION

Amici respectfully urge the Court to hold that floating structures that are intentionally and indefinitely moored, that are used in the manner of structures on fast land, that are not used for transportation on the water, and that will not be so used for the foreseeable future are not vessels within the meaning of 1 U.S.C. § 3 or the General Maritime Law of the United States. The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-626

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL MARINE BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*[1]

Amicus is the National Marine Bankers Association ("NMBA"), a national trade association consisting primarily of commercial banks, private financing firms, savings and loan companies, credit unions and retail service companies that extend or originate credit to consumers, retailers/dealers and manufacturers of recreational boats and equipment. The NMBA also includes organizations and individuals that provide ancillary services to marine lenders such as documentation servicers, remarketers, insurance agencies and maritime attorneys, among others.

The goal of the NMBA is to educate current and prospective lenders in marine financing procedures, promote credit to consumer and trade borrowers, maintain alliances with industry partners, measure and report on the vitality of the marine lending market, and maintain networking and communication among members and associate members. The NMBA also serves as a liaison between marine lending institutions in the recreational marine loan industry and the boating public.

The issues raised in this case are of significant importance to *Amicus* and its members, and have the

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[1] All parties have consented to the filing of this brief, and their consent letters are on file with the Clerk's office. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part. Boat Owners Association of the United States, through its subsidiary, Seaworthy, has made a monetary contribution to the preparation or submission of this brief.

potential to affect a significant sector of the national economy. In 2011, the recreational boating industry generated $32.3 billion in new sales and services with a total annual economic impact of $72 billion. National Marine Manufacturers Association, *2011 Recreational Boating Statistical Abstract*, iv (2012). There are approximately 12.4 million registered boats in the United States. *Id., at v.* Boating is a family activity and not just for the wealthy – 77% of all boat owners have an average median household income of **less** than $100,000.00, and 63% had a household income of less that $75,000. *Id., at iv.* Thus, whether purchasing small or large boats, used or new, most boat owners require and rely on the availability of financing from marine lenders, including NMBA members.

NMBA members literally and figuratively occupy the front line of the United States boating industry. With new boat sales at lows not seen for decades, the potential negative consequences of the Court's decision on this important industry cannot be understated. If the Court adopts Petitioner's position and reverses the court below, a previously tight, but recovering, credit market may experience further tightening, resulting in a continued decline in sales of new and used boats in the United States. In sum, *Amicus* and its members, as well as their customers, require a clear and objective standard for determining a vessel's status for purposes of invoking federal admiralty jurisdiction at the time of extending credit on watercraft, not years later. *Amicus* believes this Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 496 (2005), effectively met that need. Petitioner is seeking to advance a dangerous test for determining vessel status which would include considerations other than the

practical capability of the boat. *Amicus* have a substantial interest in this case.

SUMMARY OF ARGUMENT

Marine financing has become a complicated and cumbersome process fraught with more than 100 years' worth of conflicting legislation, court decisions and government regulations. *See, e.g.* Robert M. Jarvis, *Secured Transactions in Florida, Chapter 12-F Marine Financing*, Florida Bar, 1982, 1991, 1996, p. 3.

Marine lenders extend credit for the purchase of boats and other floating vessels, in large part because of protections afforded marine lenders under federal maritime law. Those protections include the ability to simultaneously foreclose a preferred ship mortgage via an *in rem* proceeding and pursue a deficiency judgment via an *in personam* claim against the maker, guarantor, or ship mortgagor in federal court. If Petitioner's position is accepted, marine lenders may be denied access to federal courts based upon the subjective intent and whimsical desires of the owners of watercraft. As this Court attempts to clarify the test for determining vessel status, it should not lose sight of the protections historically afforded marine lenders and the damage Petitioner's test for determining vessel status would cause to the boating industry.

Petitioner is advancing a position that will further complicate, and potentially eviscerate, protections historically provided marine lenders under federal maritime law. If Petitioner's position is adopted, marine lenders would have no idea at the time of making a marine loan whether the watercraft they

seek to lend against is a vessel, real estate, personal property or something else, and what, if any, remedies they may rely on to enforce their interest therein. Furthermore, marine lenders would be faced with the possibility that, at a later date, a once-valid marine security interest in a watercraft (their collateral) could be voided or adversely affected because the watercraft is later no longer deemed to be a "vessel," and the paperwork prepared at the time of the loan does not cover the watercraft's new status. The result would be to strip marine lenders of remedies long relied upon when extending credit on vessels and to discourage future marine lending. The resultant uncertainty would devastate the marine lending industry and the availability of credit for vessels. The recreational boating industry would be crippled.

Far from expanding the definition of "vessel", the reasoning employed by the Eleventh Circuit in the decision below, reflects a legally correct and common-sense approach to determining "vessel" status made clear by this Court in *Stewart*. Oppositely, Petitioner seeks to advance a test for determining vessel status that focuses, in large part, on the subjective intent of the owner. Petitioner's proposed test is legally flawed and impractical.

ARGUMENT[2]

I. Marine Lenders Rely Upon Federal *In Rem* And *In Personam* Jurisdiction As Security For Extending Marine Credit.

A. Congress's Passage Of The Ship Mortgage Act of 1920 And Enforcement Of Preferred Ship Mortgages Spurred On Marine Lending.

Prior to 1920, mortgage liens on vessels could not be enforced under admiralty law in federal court. Thus, lenders and creditors were left with little recourse to enforce their rights. *See Dietrich v. Key Bank*, 72 F.3d 1509, 1512 (11th Cir. 1996). To "encourage investment in shipping," in 1920, Congress enacted the Ship Mortgage Act, 41 Stat. 1000 (1920) (replaced in 1989 with the Maritime Commercial Instruments and Liens Act, Pub. L. 100-710, 102 Stat. 4739 (1988)) (the "Act"), which created remedies for lenders under federal maritime law. *Dietrich*, 72 F.3d, at 1513. Specifically, "[t]he Ship Mortgage Act provided a means through which vessel mortgages could be given preferred status and could be enforced in admiralty."[3] *Id.* A mortgage that complies with the

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[2] Mindful that the parties and other *amici* will thoroughly brief the legal issues in this case, and also of the admonition of Rule 37.1, *Amicus* in this brief will present issues, arguments and relevant factual material that may not otherwise be brought to the Court's attention.

[3] The term "vessel" for purposes of admiralty jurisdiction is defined as "includ[ing] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of

Act "ma[kes] it superior to every kind and character thereafter incurred save liens for crews' wages, general average, salvage and tort claims." *Merchants & Marine Bank v. The T.E. Welles*, 289 F.2d 188, 193 (5th Cir. 1961). As two commentators have aptly stated, "the Act provides the only true protection for a lender." Bertram E. Snyder and Steven B. Borris, *Secured Transactions and Admiralty Law: How to Have Smooth Sailing When the Collateral Is a Vessel*, 13 U.C.C.L.J. 317, 319 (1981).[4]

46 U.S.C. § 31322 defines a preferred mortgage as a mortgage that:

> (1) includes the whole of the vessel;
>
> (2) is filed in substantial compliance with section 31321 of this title;
>
> (3)(A) covers a documented vessel; ****

When a lender holds a preferred ship mortgage, Section 31325 provides a remedy to enforce that lien under federal maritime law:

> (a) A preferred mortgage is a lien on the mortgaged vessel in the amount of the outstanding indebtedness secured by the vessel.

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transportation on water." 1 U.S.C. § 3. 46 U.S.C. § 115 provides that "the term 'vessel' has the meaning given that term in section 3 of title 1."

[4] In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), this Court made clear that admiralty jurisdiction applied to pleasure boats as well as commercial ships.

> (b) On default of any term of the preferred mortgage, the mortgagee may:
>
> > (1) enforce the preferred mortgage lien in a civil action in rem for a documented vessel.

46 U.S.C. § 31325(a) and (b).

B. Default Remedies For Holders Of Preferred Ship Mortgages.

In the event a mortgagor defaults on a preferred ship mortgage, the lender has several available remedies.[5] The mortgage holder may elect to (1), pursue the mortgagor, guarantor or maker of the promissory note *in personam* in federal court under federal admiralty law (46 U.S.C. § 31325(b)(2)(A)); (2), file an *in rem* action against the vessel (as Respondent did in the case at bar) (46 U.S.C. § 31325(b)(1)); or (3), file an *in personam* action against the mortgagor,

---

[5] It is unclear whether a change in a ship's vessel status would affect jurisdiction to foreclose a preferred ship mortgage. One court has stated "[t]he subsequent removal of the vessel from navigation would not deprive the admiralty court of jurisdiction to foreclose the preferred ship mortgage." *See* e.g. *New England Fish Co. v. Barge or Vessel Sonya*, 332 F. Supp. 463 (D. Alaska 1971). In contrast, another court has stated, "[a]dmiralty is limited to vessels actively in navigation or only temporarily withdrawn, and "[w]here the facts indicate that a vessel has been indefinitely withdrawn from navigation, she is also regarded as withdrawn from admiralty jurisdiction, and services rendered to her in that state do not give rise to maritime liens." *Mammoet Shipping Co., B.V. v. Mark Twain*, 610 F. Supp. 863, 866 (S.D.N.Y. 1985). This issue is of considerable concern to *Amicus*. It appears Petitioner (and the Fifth and Seventh Circuits) would subscribe to the latter position.

guarantor or maker in state court (46 U.S.C. § 31325(c)).

The ability to file an *in rem* action against the vessel and foreclose a preferred ship mortgage is perhaps the most significant remedy available to marine lenders and creditors. During the pendency of a federal *in rem* action, the lender may request the court to order the vessel be operated by a receiver or seized by the United States Marshals Service. *See* 46 U.S.C. §§ 31325(e)(1) and (2). If the lender is successful in an *in rem* action, the court may order the vessel be sold and the proceeds used to satisfy the preferred ship mortgage. 46 U.S.C. § 31326.

In 1996, Congress recognized the need to allow lenders to foreclose a mortgage and receive a deficiency other than by proceeding in federal court. Congress amended the Ship Mortgage Act in Section 1124 of the Coast Guard Authorization Act of 1996, Pub. L. 104-324, 110 Stat. 3901, 3980 (1996), to allow preferred ship mortgage holders to use authorized state remedies if the mortgage provides for such remedies, and if the exercise of the remedy does not violate certain provisions of the Act. *See* 46 U.S.C. § 31325(b)(3)(A) and (B). Since then, many lenders have elected to self-help repossess vessels rather than burden the court system. However, if it is unclear whether a watercraft classified as a "vessel," or if there is a potential for the watercraft to be deemed to be something other than a "vessel" by the court, the lender may be required to seek a judicial remedy to avoid the consequences of self-help. Even then, if the collateral is not determined to be a vessel, the protection afforded by the Act is not available to the lender.

When necessary, lenders elect to foreclose a preferred ship mortgage by filing suit in federal court naming the vessel and mortgagor, maker and guarantor as defendants in a single case, thus streamlining enforcement, reducing costs and ensuring the strongest protection of its interest. However, if this Court determines that a vessel owner's intent can change the status of a vessel, and, thus, thwart admiralty jurisdiction, the uncertainty will directly impact the lending community. If a vessel's owner initially signed a preferred ship mortgage, but later successfully claims that the ship is no longer a vessel, but, for example, real estate, lenders cannot redo the loan documents at that point. Lacking a real estate mortgage if the collateral is deemed to be real estate, the lender ends up with an unsecured loan. At a minimum, consumers may face higher interest rates to offset the lender's increased risk and uncertainty. At worst, lenders will leave the industry for other lending opportunities.

II. Petitioner Seeks To Advance An Arbitrary, Subjective And Impractical Method For Determining Vessel Status And Invoking Federal Admiralty Jurisdiction.

If the Court adopts the position of Petitioner and the Fifth and Seventh Circuits, marine lenders may be denied access to federal courts, their remedies may be eviscerated, and marine lending will be chilled. Both the Fifth and Seventh Circuits have incorrectly advanced a standard for determining vessel status that relies upon the subjective intent of the owner of the vessel, which can change and be manipulated.

A. The Fifth and Seventh Circuits have ignored *Stewart* by adopting a test for determining vessel status which considers the intent of the boat owner.

In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 856 (7th Cir. 2004), the Seventh Circuit concluded that a floating casino was not a vessel because it was not used or intended to be used for the purpose of moving or transporting. Likewise in *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006), the Fifth Circuit concluded that a floating casino was not a vessel because "the Defendants d[id] not intend to use it as such. Rather, their intent [wa]s to use it solely as an indefinitely moored floating casino." *Id.* at 187. Finally, in *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), the court opined that "[y]et maybe by analogy to the difference between domicile and residence a boat also is 'permanently' moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only 'indefinitely' moored. These are matters for exploration on remand." *Id.* at 1016.

As the Eleventh Circuit has pointed out, formulating a test for determining federal admiralty jurisdiction based upon the highly subjective, self-serving, arbitrary and capricious intent of the owner of the vessel is unworkable:

> The owner's intentions with regard to a boat are analogous to the boat's "purpose," and *Stewart* clearly rejected any definition of "vessel" that relies on such a purpose. See *id.* [543 U.S.,] at 497, ("Under § 3, a 'vessel' is any watercraft

> practically capable of maritime transportation, regardless of its primary purpose ...."). Further, such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction. [*Doe v.*] *Celebrity Cruises, Inc.*, 394 F.3d [891 (11th Cir. 2004),] at 902 ("[T]he purpose behind the exercise of this Court's admiralty jurisdiction is to provide for the uniform application of general maritime law.").
>
> Under *Tagliere* and *De La Rosa*, a boat may enter and leave admiralty jurisdiction on the basis of state law and the individual thoughts of the boat owner as to what use of the boat is most desirable. As the Louisiana legislature demonstrated by its actions in 2001, state law can change. Further, if legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel, and those working upon it and around it lose their protection under the Jones Act or the LHWCA. Such a result is clearly not what the Supreme Court intended. *See Stewart,* 543 U.S. at 494, 125 S.Ct. 1118 (noting that seamen do not lose their protection under the Jones Act due to minor changes in ship location). Also, an owner's intentions may change in ways never anticipated.

Board of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans, 535 F.3d 1299, 1311-12 (11th Cir. 2008).

This Court has previously demonstrated its desire to provide uniformity within admiralty jurisdiction

and the application of maritime law. *See, e.g., Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14 (2004) (collecting cases). The possibility of a boat's entering and exiting vessel status on the whim of an owner would cause havoc in the marine financing industry, leaving lenders to wonder whether an *in rem* or *in personam* claim filed in federal court would be dismissed for lack of jurisdiction because the owner of a watercraft changed his mind and no longer intended that the boat be used for transportation on the water.

The practical absurdity from the lender's prospective of considering an owner's intent for purposes of determining vessel status is demonstrated by the recent unreported decision in *Louisiana International Marine, LLC v. Drilling Rig Atlas Century*, No. C-11-186, 2012 WL 1029934 (S.D. Tex. Mar. 9, 2012).[6] The case involved an oil drilling rig

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[6] For a more high-profile example of an owner changing its intent with respect to a vessel, *see also* http://maritime-executive.com/article/cruise-ship-queen-elizabeth-2-to-become-dubai-floating-hotel ("Dubai purchased the *Queen Elizabeth 2* (QE2) cruise ship from Cunard cruise line for $100 million in 2007. An official decision on what to do with the liner have been decided on with plans to transform it into a floating hotel fitted with many of the vessel's original furnishings. The ship will remain in the downtown Port Rashid facility to serve as a tourist attraction alongside a projected maritime museum and an expanding cruise ship terminal complex. The newly-announced plans are slightly different than initially proposed. Before Dubai's economy took a turn for the worse, developers intended on carrying out an extensive overhaul on the luxury liner and converting it into an exclusive hotel docked by one of the sheikdom's manmade islands. The chairman of Istithmar World – the ship's owner – said he expects the 300-room hotel to open within 18 months, according to the Washington Post.")

known as the *Atlas Century*. The rig was constructed in 1973, and removed from service in 1998. Its hatches were battened down and operations shuttered. In 2003, the *Atlas Century* was purchased by a new owner. Apparently the rig remained idle. In 2010, the rig was again sold, this time to the defendant, KTM. KTM received financing to purchase the rig on the premise that it would dismantle the rig and sell it for scrap. But the *Atlas Century* was never scrapped. Instead, in 2011, KTM entered into several contracts, including an agreement with the plaintiff, to have the rig towed from its location in Texas to Dubai. KTM eventually used a different company than the plaintiff to tow the *Atlas Century*. The plaintiff subsequently filed an *in rem* action against the *Atlas Century* and an *in personam* claim against KTM in federal court for breach of its towing agreement with KTM. In opposition to the claim, several intervening parties, aligned with KTM, argued that the *Atlas Century* was a "dead-ship", not a "vessel," and therefore the court had no jurisdiction.

The district court concluded that at the time the rig was purchased by KTM it was not a vessel, because KTM intended to scrap the rig. "The fact that Bayfront and Basic provided financing on the understanding that the rig would be 'dismantled and sold for scrap value' suggests that no entity even contemplated returning the rig back to active service at that time." *Id.* at 4. However, the court went on to find that at the time the *Atlas Century* was towed it was a vessel, because KTM had assured its towing contractors that the *Atlas Century* was "seaworthy and capable of floating without additional work or equipment." *Id* at 5. While nothing structurally changed between 2010 and 2011 on the *Atlas Century*

to make it more seaworthy (in fact pieces of the rig were actually removed during this time), the owner's intent regarding the rig changed, and, thus, the rig literally floated in and out of federal admiralty jurisdiction. The Court stated that "[t]he Fifth Circuit, however, recognizes that a shipowner's intent may play a significant role in determining whether a structure was 'permanently moored' and therefore not practically capable of use as a means of transportation on the water." *Id.* at 7. The court reached this conclusion despite recognizing that "[t]he Supreme Court's analysis in *Stewart* focused solely on the physical characteristics... and the Court devoted no discussion ... to the owner's subjective intent or plans." *Id.*

While the Fifth and Seventh Circuits wrongly consider the subjective intent of the owner, more concerning is the apparent acknowledgement in these circuits that *Stewart* directed the focus (quite clearly) of determining vessel status on the objective physical capability of the craft. The result has been that litigants seeking to invoke federal admiralty jurisdiction over disputes concerning what appear to be vessels are subjected to a proverbial jurisdictional "hokey pokey."

Petitioner's own argument further demonstrates this point. Petitioner now claims that his "floating home" is more akin to real estate.[7] (See Petitioner's

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[7] Petitioner has secured the vessel no more permanently than most watercraft at marinas throughout the United States. A majority of marinas have dock boxes which provide watercraft with electrical and water connections. Marinas offer "power pedestals" which provide electricity, water, and now services such

Brief, p. 16)("regulation of such structures is better left to land-based law."). Under Petitioner's proposed test for determining vessel status, a marine lender faced with the prospect of lending against Petitioner's "floating home" would have no idea how to characterize the collateral. Is the collateral a vessel, real property, personal property, or something else? A lender would also have no ability to know what remedies, if any, it would have to enforce its interest in the collateral.

Moreover, the collateral can subsequently change character with the intent of the owner. If so, this change in character affects the rights and remedies previously provided to the lender. If lenders had no idea whether the collateral was real estate, personal property, or a vessel, how would the lender secure its collateral? Would a real estate mortgage be required, a UCC financing statement, or preferred ship mortgage? Perhaps all three methods of securing collateral would be required. If a real estate mortgage were required, what legal description would be used? Moreover, many national recreational lenders rely on preemption protections afforded to national banks by the decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), to operate in many, if not all fifty states. If a marine lender needed to satisfy the individual requirements for each state to operate in

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as cable television, internet service and telephone service. Bill Moses, *The Power Pedestal: Past, Present and Future*, 24 Marina Dock Age, Mar. 2011, at 40. Petitioner's vessel was attached to the dock with ordinary ropes, an extension cord and a common water hose. Thus, counter to Petitioner's claims, his vessel was by no means permanently moored, and a vessel having utility connections at a marina is not unusual.

that state as a recreational lender, as with real estate mortgages, many lenders would cease making recreational boat loans.

Under the circumstances, even if this Court accepts Petitioner's argument, at a minimum, its decision should be clear that once a preferred ship mortgage is granted, admiralty jurisdiction continues until the mortgage is discharged or the mortgagee consents, notwithstanding a subsequent change in the intent of the owner. The security of the lender must remain valid much like the procedure set forth in 46 C.F.R. § 67.161, which provides that a Certificate of Documentation once issued to a vessel which is subject to an outstanding filed and recorded mortgage, remains valid for purposes of the Act, despite the fact that the vessel owner fails to renew the Certificate of Documentation. Similarly, once a vessel is documented and a preferred ship mortgage recorded against it, the vessel should remain subject to the Act, notwithstanding any subsequent action or change of intent by the owner.

The test discussed in *Stewart*, and followed by the Court of Appeals below, correctly considers the practical capability of the watercraft. This test leaves little, if any, uncertainty by lenders and borrowers as to whether a watercraft is a vessel and subject to federal admiralty jurisdiction. More importantly, the test bars the owner of a watercraft from manipulating the character of the watercraft for purposes of frustrating a lender's interest therein. The point is to avoid a subjective, boat-by-boat, day-by-day inquiry as to the character of a watercraft.

Absent a broad and objective standard for determining vessel status, lenders cannot assume the economic risk attendant to lending on what they believe are vessels only to learn later that they have no enforceable security interest after an owner's change of mind. If watercraft can pass in and out of vessel status based upon the subjective intent of an owner, marine lending will drastically decrease.

B. Under Petitioner's proposed test, *Amicus's* members could not rely on documentation executed in connection with marine loan transactions.

If Petitioner succeeds in his objection to federal admiralty jurisdiction, in the face of a written agreement to the contrary, *Amicus's* members would lose federal remedies, even after a borrower contractually acknowledges that his or her watercraft is a vessel subject to a maritime lien and federal jurisdiction. Petitioner acknowledged in his written agreement (the "Agreement), with the Riviera Beach Marina that his watercraft was a "vessel" and was subject to federal admiralty jurisdiction. The Agreement provides in part:

> Owners of *vessels* assigned slips, moorings, or dry-storage spaces as may be specifically designated by the City at Marina facilities agree to relinquish their berth when requested by the City.... [T]he City may at any time, in its absolute discretion, require the Owner to remove the *vessel* from its assigned storage area to another storage area within the Marina, and

> if the Owner fails to comply, the City shall have the right to move the *vessel* itself.

JA13-14. (emphasis added).

***

> In addition to any other remedies provided for in this Agreement, the Marina, as a provider of necessities to this vessel, *has a maritime lien on the vessel and may bring a civil action in rem, under 46 United States Code 31342 in Federal Court*, to arrest the vessel and enforce the lien and shall not be required to allege or prove in such action that credit was given to the vessel.

JA15. (emphasis added).

Although Petitioner in this case granted no preferred ship mortgage, had he had done so, his argument would arguably invalidate that mortgage.

To the extent that a ship's change in vessel status can preclude a lender from invoking federal admiralty jurisdiction to foreclose a preferred ship mortgage, and such a change can be precipitated by an owner's intent, *Amicus* and its member lenders stand to lose the substantial federal protections historically provided marine lenders, resulting in decreased access to credit for consumers and the marine lending industry alike. Most alarming is that even when the boat owner, such as Petitioner, agrees and acknowledges that a watercraft is a vessel and subject to federal admiralty jurisdiction, the owner's subsequent intent that the watercraft is not a vessel can effectively trump a prior agreement to the contrary. Confirming such a test

would serve to encourage borrowers to manipulate the lender's collateral and further strain an already fragile recovery in the marine lending industry. Lenders need certainty when lending, and Petitioner's position would open the door to self-serving, after-the-fact manipulations by vessel owners which would gut the marine lien system.

CONCLUSION

For the foregoing reasons, *Amicus* requests that the Judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

FANE LOZMAN

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE SEATTLE FLOATING HOMES ASSOCIATION AND THE FLOATING HOMES ASSOCIATION OF SAUSALITO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the Seattle Floating Homes Association ("Seattle Association") and the Floating Homes Association of Sausalito ("Sausalito Association"). The Seattle Association represents owners of floating homes—*i.e.*, residences that are built on flotation devices and are designed to be indefinitely moored and connected to land-based utilities—on Portage Bay and Lake Union in Washington State. It was founded in 1962, and its members represent 250 of the roughly 500 floating homes in Seattle. The Sausalito Association was founded in 1985 to represent floating homes located on Richardson Bay, an inlet of the San Francisco Bay. Its members represent roughly half of the more than 500 floating homes in Sausalito and the immediately adjacent unincorporated regions of Marin County.

Amici have a profound interest in this case, because the rule adopted by the Eleventh Circuit below threatens to sweep floating homes into the definition of a "vessel" under 1 U.S.C. § 3, and thus subject their members' single family residences to the broad array of legal doctrines and remedies of federal admiralty and maritime law. If affirmed, the holding of the Eleventh Circuit could radically alter the legal regime that applies to floating homes, and supplement or displace longstanding state and local laws governing these land-affixed residences with requirements intended for maritime transportation.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici Curiae or their counsel contributed money to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In this brief, Amici describe the design and purpose of floating homes, their structural limitations, and the nature of the communities that comprise them. These facts establish that floating homes are stationary residences, by design and in practice. They lack any means of self-propulsion. They are attached to land-based moorage facilities, and their residents depend on connections to land-based utilities for water, electricity, sewage treatment, and other necessities. They are governed by most of the same building code provisions that apply to upland homes and are built using essentially the same materials and techniques that one would employ in building a house on land. They sit atop flotation devices selected for durability and stability, which are often singularly unsuited for being towed through the water. Owners of floating homes normally keep their homes in the same place for decades at a time. Floating home owners develop bonds with their neighbors and put down roots in the community. Floating homes are rarely moved, and when they are, it is a complicated and dangerous endeavor.

Amici also argue that the Court should reject Respondent's invitation to pin federal vessel status under 1 U.S.C. § 3 on these stationary residences, which are a functional extension of the land. The existing state and local regulatory regime for floating homes is comprehensive, effective, and carefully tailored to the localized issues that floating homes implicate. This current regime accords with the national tradition of local control of land use. Reclassifying floating homes as vessels would frustrate local regulation that has evolved over

decades with input from diverse stakeholders. And the reclassification could have numerous undesirable consequences, subjecting floating homes to a panoply of ill-fitting doctrines and requirements intended for maritime transportation.

ARGUMENT

I. FLOATING HOMES ARE STATIONARY RESIDENCES THAT ARE ATTACHED TO THE LAND, NOT DESIGNED FOR TRANSPORTATION, AND RARELY EVER MOVED.

A. Like Upland Homes, Floating Homes Are Intended To Be Stationary And To Remain Connected To Moorage Facilities And Land-Based Utilities.

Like upland houses, "floating homes" are residential structures that are attached to the land. Not only are they affixed to piers or pilings, but they are connected to all of the land-based utilities upon which modern home dwellers rely.[2] Like upland houses, floating homes are located in communities, where homeowners come to settle for decades, build relationships with their neighbors, and join homeowner associations. Like upland houses,

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[2] *See, e.g.*, A. Jeffries, *Floating Homes Weather Housing Crisis*, Or. Bus., March 2010, (Jeffries) *available at* http://www.oregonbusiness.com/articles/82-march-2010/3079-liquid-assets ("Floating homes are permanent houses . . . [that] come with all the comforts—water, telephone, heat, a complete septic system—of a house on land.").

floating homes have no means to move themselves.[3] Like upland houses, they can be expansive—with some floating homes measuring 4,000 or 5,000 square feet.[4] *See generally* N. Gromicko & K. Shepard, *Inspecting Floating Homes*, http://www.nachi.org/inspecting-floating-homes.htm (Gromicko & Shepard) (describing floating homes as homes that are "constructed on a float; designed and built to be used as a residential dwelling; stationary by being moored or anchored, and not meant for navigation; without a means of self-propulsion; powered by utilities connected to the shore; and permanently and continuously connected to a sewage system on shore.").

The only substantial difference between floating homes and their upland counterparts is the foundation on which they rest. While upland houses rest on a solid foundation that is connected to the earth, floating homes rest on a flotation device that sits upon the water.

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[3] *See, e.g.*, K. Carber, *Floating Through Life*, S.F. Chron., Oct. 4, 2003, at E3 (observing that floating homes lack any mechanism for "self-propulsion").

[4] *See, e.g.*, *Nine Outrageous Floating Homes For Sale*, Forbes.com, June 23, 2011 http://www.forbes.com/sites/zillow/2011/06/23/9-outrageous-floating-homes-for-sale/ (describing "humongous, 4,200 sq ft floating home on Portland's Columbia River," which is "built on a concrete slab that can 'hold up [to] 2 million pounds" and contains "5 bedrooms and 4.5 baths" as well as a "17-foot swim spa off the master deck"); T. Laturnus, *Floating Homes* 61 (1986) (Laturnus) (describing floating home that is "a 3000-square-foot floating palace, replete with electronically-controlled drapes that open and close in relation to the sun's location, sauna, whirlpool, roof garden, solarium, and maid's quarters").

Statutory definitions of the term "floating home" reflect the stationary nature of these structures, and the fact that they are connected to land. In California, for example, floating homes are defined as

> a floating structure which is all of the following: (1) It is designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling. (2) It has no mode of power of its own. (3) It is dependent for utilities upon a continuous utility linkage to a source originating on shore. (4) It has a permanent continuous hookup to a shoreside sewage system.

Cal. Health & Safety Code § 18075.55(d); *see also* Idaho Code Ann. § 55-2704(1) (same).

Such definitions also specify that floating homes are not to be confused with "vessels." *See* Wash. Rev. Code § 90.58.270(5)(b)(ii) ("'Floating home' means a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, *and is not a vessel*, even though it may be capable of being towed.") (emphasis added); *cf.* Cal. Harb. & Nav. Code § 501(e) ("'Vessel' means every description of watercraft, other than a seaplane on the water or a floating home . . . .").

Floating homes are distinct from "houseboats," which are vessels that are intended to move across water under their own power. A contemporary houseboat "is a wide and slow-moving power boat propelled by an inboard or outboard engine, with a relatively flat hull and shallow draft designed for short-term living and light cruising on inland lakes, rivers, canals, and bays." B. Flanagan, *The*

Houseboat Book 20 (2003) (Flanagan). Not only must houseboats have mechanisms for propulsion and steering, they also must have "deck fittings, navigational and nautical equipment, and the required marine hardware," as well as "a seaworthy hull design that meets U.S. Coast Guard standards for flotation, safety equipment, fuel, electrical power, ventilation, and an on-board sewage system." Gromicko & Shepard; *see also* 33 C.F.R. § 173.3 (Coast Guard regulation on vessel numbering and accident reporting, defining "houseboat" as "a motorized vessel that is usually non-planing and designed primarily for multi-purpose accommodation spaces with low freeboard and little or no foredeck or cockpit"). Floating homes generally do not include any of these features.[5]

To be sure, some written authorities use the term "houseboat" to refer also to stationary floating homes without any means of self-propulsion. *See, e.g.*, Flanagan 20; Sausalito Municipal Code § 16.08.020(C). But this occasional loose language belies the clear and well understood distinction between floating homes, which cannot be moved unless they are disconnected from the land and towed by another vessel, and house boats, which are designed to move under their own power. *See* Flanagan 20 ("In the lingo of marinas the understanding is simple. Houseboats propel

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[5] Floating homes are also distinct from "house barges," which are floating residences that, unlike floating homes, are specifically designed to be towed. *See* Gromicko & Shepard; *see also* Seattle Municipal Code § 23.60.916 ("'House barge' means a vessel that is designed or used as a place of residence without a means of self-propulsion and steering equipment or capability.").

themselves. Floating homes have no motor . . . ."); *id.* at 26 (describing "floating homes" as "non-motorized dwellings—built on flotation devices—designed to remain in slips where they will be connected to water, electrical, and sewage services").

Floating homes are typically located at a residential moorage facility, the aquatic equivalent of a suburban subdivision. The homes are generally moored alongside docks supported by pilings, in designated spaces called "slips" or "berths."[6] Similar to upland homes, there are a variety of legal mechanisms by which floating home residents may possess their slips. Floating home residents may lease their slip, either for a fixed term or on a month-to-month basis. They may form a cooperative with other floating home owners, which owns the dock and the slips collectively. Or they may own the slip and the land underneath it as a condominium. *See generally* F. Russell, *Flotation, flotation, flotation*, Puget Sound Bus. J., July 12-18, 1996 (Russell). It is increasingly common for floating home owners to own their slips. *See ibid.* The cost of purchasing a slip can exceed $100,000,[7] an investment that ties floating home owners to their moorage facility in a financial sense.

Floating home owners are also connected to the moorage facility in a physical sense. First, their

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[6] For ease of reference, Amici will refer to these collectively as "slips."

[7] *See* G. Marden, *Floating Homes FAQ's*, http://www.oregon-floating-homes.com/portland_oregon_floating_homes_faq.htm ("Slip prices range from about $75,000 to $150,000, depending on the moorage, the exact location of the slip, and whether a garage is included.").

homes are tied to the dock or to pilings, usually with ropes or chains. Using this type of flexible material instead of a rigid connection "allows the home to rise and fall with the tide or seasonal changes in water levels and puts less stress on permanent docks and mooring anchors." Gromicko & Shepard. Second, floating homes "are 'permanently' connected to services via conduits and PVC pipes, rigid or flexible, running under the docks." Flanagan 22. Typically, "gas, water and sewer pipes and electrical power lines are suspended from the undersides of docks and branch out to homes in each slip."[8] Gromicko & Shepard.

Connections to various land-based utilities are a defining feature of floating homes. As previously noted, the statutory definition of a floating home in California and Idaho provides that the structure is "dependent for utilities upon a continuous utility linkage to a source originating on shore." *Supra* at 5. In some jurisdictions, utility connections are required by law. In the City of Sausalito, for example, floating homes are required to have a "secure water connection" and a "permanent and adequate electrical connection." Sausalito Municipal Code §§ 16.08.030(C)–(E).

Because floating homes rely on land-based utility connections for water, electricity, heat, and so on, they lack parallel systems that can provide these necessities if the home is detached from its moorage facility. Once detached, the house may only be rendered operable again if it is re-connected to utilities at one of a very small number of floating

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[8] Modern floating homes are usually also connected to cable television and broadband internet services.

home moorage facilities that offer the necessary services.

B. Most Floating Homes Are Part Of Stable, Permanent Communities.

Since floating homes are stationary, and often occupied by the same owners in the same slip for decades at a time, vibrant communities have grown up around floating home moorages.

The largest floating home communities in the United States are found along the Pacific coast. Over 2,300 floating homes line the Columbia and Willamette Rivers near Portland, Oregon. Jeffries. In Seattle, where the forlorn character played by Tom Hanks paced the terrace of his floating home in the film *Sleepless in Seattle*, there are around 500 homes in the waters of Portage Bay and Lake Union.[9] In the San Francisco Bay Area, Sausalito hosts an iconic floating home community of over 500 homes, where Otis Redding once penned the song *Sitting on the Dock of the Bay*.[10]

Hundreds of other floating homes are found across the nation. For example, in the San Francisco Bay Area, floating homes are also found along Mission Creek in the city of San Francisco, at Point San Pablo, Berkeley, and Alameda in the East Bay, and in Redwood City on the Peninsula. On the eastern seaboard, floating homes are found in Washington,

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[9] *See* Seattle Floating Homes Association, http://www.seattlefloatinghomes.com.

[10] *See* J. Greenwald, *Livin' on the Dock of the Bay*, Smithsonian Mag. (Apr. 4, 2012), http://www.smithsonianmag.com/people-places/Everything-Floats-Their-HouseBoats-What-Its-Like-to-Live-on-the-Dock-of-the-San-Francisco-Bay.html.

D.C., New Jersey, and Florida, among other places. Floating homes also dot lakes and waterways in the interior of the country. For example, there are around 200 floating homes in Idaho, most on Lake Pend Oreille.

The communities that form around floating home moorage facilities are like upland communities, with their own histories, unique and vibrant identities, and strong ties between neighbors. In many cases, floating home communities were born out of a need for affordable housing. In Seattle, for example, the modern floating home community emerged during the Depression, when people "desperately seeking cheap places to live" erected structures on log floats on Lake Union. B. Means & B. Keasler, FHA History, http://www.seattlefloatinghomes.org/about/history (Means & Keasler). Floating homes remained popular during World War II and in the post-war years because they were comparatively less expensive than upland housing. *See* H. Droker, *Seattle's Unsinkable Houseboats* 88, 91 (1977) (Droker). Sausalito's floating home community, located in and around a former shipyard, blossomed in the 1950s and 1960s when people moved there because of the opportunity for affordable housing. *See* J. Greenwald, *Livin' on the Dock of the Bay*, Smithsonian Mag. (Apr. 4, 2012) (Greenwald).[11]

Over time, floating home owners in these communities organized themselves, working together to build necessary infrastructure such as sewer

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[11] *See also* S. Dreman, *Floating homes*, Palo Alto Online, http://www.paloaltoonline.com/news_features/real_estate/spring2004/floatinghomes.php (describing Silicon Valley resident who built a floating home because "It's the only source of true affordable housing left" in the area).

connections, and fighting against waterfront development, evictions, and efforts to regulate their homes out of existence. *See* Means & Keasler; Droker 101-129; P. Frank, *Houseboats of Sausalito* 109 (2008). The larger floating home communities formed nonprofit associations of floating home owners—including Amici as well as associations in Alameda, Portland, and elsewhere. These associations are dedicated to strengthening and protecting their respective communities. Like other neighborhood associations, they elect boards of directors, publish newsletters, and host community events such as dances and fire safety trainings.[12]

The close quarters and shared docks at moorage facilities build strong relationships between neighbors. *See* Greenwald ("Here, walking to and from your boat, you meet half the people on the dock. Yes, we all come from diverse economic backgrounds. But when there's a problem, everybody comes out and helps one another."). Residents of floating home moorage facilities look after each others' homes, and lend a hand when their neighbors are in need. *See ibid.*; T. Laturnus, *Floating Homes* 18 (1986) (Laturnus).

Many floating home owners are drawn to their houses not just for the opportunity to live in relatively affordable housing on the water, but also by a desire to be a part of these permanent communities.[13] In Sausalito, hippies who originally

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[12] *See generally* http://www.seattlefloatinghomes.org/about; http://www.floatinghomes.org; http://www.alamedafloatinghomes.org.

[13] To be sure, some floating homes are found at mixed-use marinas, which may lack some of the sense of community found in dedicated floating home moorages. But the floating home

helped found the floating home community have been joined by physicians, lawyers, and other professionals, attracted by the diversity of the waterfront. *See* Greenwald ("There are people on welfare, there are millionaires, there are outstanding artists, there are computer whizzes."). In Seattle, many floating homes have been purchased by transplants from the suburbs, enchanted not only by the views and the proximity to the city, but also by the "spirit of community among their neighbors." Russell.

Important geographic and environmental differences distinguish floating home communities. For example, whether a moorage facility is in salt water or fresh water affects the design of the floating homes located there. Log floats are rarely found in salt water, because they are subject to infestation by salt water teredo worms. Laturnus 41. And flat-bottom boats are more common in tidal areas, where floating homes often rest on the mud at low tide.

C. Floating Homes Are Designed To Be Stationary, And Not To Be Used For Transportation.

Designing and building a floating home is not very different from designing and building a home on land. *See generally* Laturnus 64 ("Building a floating home isn't, surprisingly perhaps, much different from building a house on land."). It involves the same professionals, most of the same building code provisions, and the same materials and construction techniques.

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residents who dwell there are still attracted to the unique experience of living on the water while connected to the land.

Floating homes are typically designed by architects, sometimes with the assistance of structural engineers. Marine engineers, yacht designers, and other professionals with expertise in the design of vessels are not normally involved in the design or construction of floating homes. Given the relatively small quantity of new floating home construction, floating home architects generally have a mixed practice, working on both floating and upland structures. They design floating homes in a wide variety of architectural styles, most of which also can be found on land.[14]

With a few exceptions, floating homes must comply with the same building code provisions that bind upland homes; municipal codes governing floating homes typically incorporate the standard building code by reference.[15] The codes then provide additional or different regulations specific to floating homes, such as provisions governing the type of flotation device or the amount of "freeboard" (*i.e.*, the distance from the waterline to the first floor or deck of the floating home). *E.g.*, Alameda Municipal Code §§ 13-38.16–17. *See infra* at 25, 27.

Because standard building code provisions apply to floating homes, contractors employ essentially the same materials and techniques in erecting a floating home as they would use on land. These include heavy materials, used for stability and durability, which would not be employed on a vessel of similar size. For example, architects routinely use wooden I-

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[14] Flanagan 26 (describing floating homes built to be "cabin[s]," "cottage[s]," and "townhouse[s]").

[15] *See, e.g.*, Marin County Code § 19.18.040; Alameda Municipal Code § 13-38.6; Portland City Code § 28.01.020.

joists to support the floor and roof of a floating home. This type of structural member weighs several pounds per foot, depending on the dimensions, and is too heavy and bulky for use in most vessels.

The main design difference between floating homes and their upland counterparts is that floating homes are built on flotation devices instead of foundations.[16] The designer of a floating home must give careful consideration to the type of flotation device, the weight of the structure that will rest on it, and the distribution of weight, to ensure that the floating home will be sufficiently buoyant and will sit stably upon the water.

Floating homes use numerous types of flotation devices. The vast majority of floating homes in Seattle and Portland are built atop a raft of logs initially tied together decades ago. *See generally* Laturnus 32 (describing raft flotation device). When the original logs become soaked and lose some of their buoyancy, additional logs are added below them. As this process is repeated over the years, the homes eventually collect "an inverted pyramid of logs beneath them." *Id.* at 40. When more logs cannot be added, an assortment of supplemental flotation devices are attached to the logs for additional buoyancy. Flanagan 62; Laturnus 10, 47. All told, a typical log float will weigh at least twenty tons. Laturnus 36.

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[16] One other difference is that floating homes, unlike upland homes, are typically required to have a holding tank for waste and a device called an "ejector." *See, e.g.*, Marin County Code § 19.18.120. This is because floating homes are at a lower elevation than the municipal sewer systems, and the device is needed to pump the sewage uphill into the municipal system.

Most floating homes in Sausalito and elsewhere in the San Francisco Bay Area rest on concrete flotation devices. *Id.* at 34. Concrete flotation devices, "considered to be the '*ne plus ultra*' in houseboat flotation," *id.* at 45, are typically shaped like massive shoe boxes. They are also quite heavy. A sixteen by thirty-six foot concrete float will generally use about two tons of reinforcing bars. Flanagan 63. The concrete and the house above add a dozen tons or more. *See* Laturnus 39.

Floating homes can also be built upon box-flotation devices made of other materials, such as steel. Another approach is to build on pontoons, which can be made out of materials like steel, plywood, styrofoam, or fiberglass. In some cases, floating homes are built on old hulls. *See generally* Laturnus 32-34; Gromicko & Shepard.

In selecting a flotation device and designing the home that will sit above it, designers of floating homes do not focus on whether it can be transported effectively. The emphasis is on how the flotation device will sit on the water, not how it might move through the water. This explains the popularity of boxy, heavy, concrete flotation devices, which—unlike boats and most barges—lack any sort of angled bow, or other slope or curvature to make them more hydrodynamic and minimize water resistance.[17] This is a key point of distinction between floating homes and houseboats. "Motorized, boatlike houseboats require maneuverable,

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[17] *See* Greenwald (noting that most floating homes in Sausalito are "encased in concrete hulls," which offer "protect[ion] from rot and ocean organisms at the price of immobility").

lightweight hulls, or pontoons, designed to slice through protected waters using minimal fuel," Flanagan 59, and for that reason are designed with the assistance of marine engineers or yacht designers. Floating homes, designed by architects and intended to be stationary, do not typically include these features.

The shape of the flotation device is just one of many areas where the typical design of floating homes ignores elements that would be crucial for watercraft intended for transportation. Floating homes are not designed to be aerodynamic above the water line. They are not designed to include a motor, or any sort of mechanism to facilitate steering. They are not designed to resist waves or choppy waters. Indeed, floating homes often have doors and windows that are just above the waterline and are ill-equipped to resist repeated battering with waves. Floating homes also lack equipment that is commonly found on boats. They do not have navigational systems, batteries, independent electrical systems or water systems, and so forth. Nor are floating homes designed to comply with any of the myriad safety requirements and regulations that apply to vessels. Although floating homes may be designed with mooring rings so they can be connected to pilings, they generally lack the T-shaped metal "cleats" or "bits" that are commonly found on boats and typically used when towing vessels and barges. And they frequently lack any side walkways from which to push the home away from the dock.

Furthermore, when floating homes are inspected after their construction or before a sale, the inspector generally does not examine whether they are in a condition to be towed. Instead, floating home

inspections focus on compliance with building codes, and factors that have to do with the buoyancy, stability, and durability of the home. For example, inspectors measure for compliance with height limitations, test whether the house is "'listing' to one side or another," assess whether utility connections are adequate, and may also dive under the house to examine the sufficiency of the flotation. Gromicko & Shepard.

D. Towing Floating Homes Is Complicated, Dangerous, And Rare.

Because floating homes are not designed or intended for transportation, it is complicated and expensive to tow them, regardless of the distance. Indeed, the very act of towing can imperil a home. For these reasons, among others, floating homes are rarely towed more than a few times during their lifespan, if that.

As discussed above, the flotation devices underlying most floating homes are not designed to move smoothly through the water. *See supra* at 15–16. The boxy profile of a concrete float, for example, coupled with its immense weight, limit the speed at which a home on such a float may be towed to just a few knots.[18] *Cf.* Laturnus 34 (disadvantages of "[b]ox-type flotation" include "difficulty in towing for any distance"). Moreover, because of their flat bottom and square end, concrete floats do not tow in a straight line, but instead make unpredictable lateral movements as they are towed.

Homes built on log floats face even graver challenges when towed. As described above, these

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[18] A "knot" is equal to approximately 1.15 miles per hour.

homes sit above an inverted pyramid of soaked logs supplemented by additional flotation devices that collectively weighs twenty tons or more. *See supra* at 14; *see also* Laturnus 47 (describing supplemental flotation devices, including "three-hundred-gallon stove oil tanks, mooring buoys, forty-five gallon drums, and plastic barrels filled with foam"). This complex collection of logs, barrels, and other flotation devices makes towing a challenging and dangerous endeavor. The inverted pyramid of logs is not hydrodynamic. Moreover, when a home on a log float is towed through the water, logs and supplemental flotation devices commonly break away from the float, thereby threatening the home's flotation.[19] For these reasons, and because of log floats' extraordinary weight, the maximum speed for towing a home on a log float is even slower than for homes on concrete floats. Some tugboat captains will not tow a log float faster than one knot.

Floating homes constructed on other types of flotation devices may also be imperiled if they are towed. One serious danger, particularly for homes built on open flotation devices, is that they will take on water and sink. A leading book on floating homes recounts the story of a home built upon "pontoon flotation that was open at the top." Laturnus 35. "When it was moved, the forward motion of the houseboat in the water, in combination with the propeller turbulence of the tow vessel, swamped the

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[19] Homes on concrete floats, or floats made out of other materials, sometimes also employ supplemental flotation devices. This is particularly common when there is a large concentration of weight on one side of the home. To the extent that these homes are towed, they also face the risk of losing their supplemental flotation devices.

houseboat and filled the flotation tanks on one side before the houseboat had gone fifty feet." *Id.* at 36. Indeed, the danger of taking on water during a tow applies to all types of floating home designs, because of the very short distance between the waterline and the floor of the home. To minimize this risk, one must board up windows and doors, and attach a splash board or other mechanism intended to fend off waves and swells, prior to a move.

Another challenge presented when towing floating homes is their large profile above the water, which can act as a massive sail during windy conditions. In Marin County, for example, floating homes may be forty-six feet long and may rise to sixteen feet above the water (or even higher if the owner obtains a variance). *See* Marin County Code §§ 19.18.050–051. A home of these standard dimensions creates a "sail" of over 700 square feet, which cannot be trimmed or reduced. In windy conditions, it may push the home in the wrong direction as it is being towed. Indeed, if a home has a high center of gravity, it risks being blown over when exposed to high winds.[20] For these reasons, tugboat captains typically must wait for a perfectly still day without any wind to tow a floating home.[21]

Even in ideal weather conditions, the process of moving a floating home is fraught with danger because the home's large contours diminish visibility

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[20] *Cf.* Laturnus 34 (describing floating home "that has blown over, not once, but *twice* in high winds, simply because it floats four feet out of the water and only draws a foot of water, giving it a high center of gravity").

[21] In tidal areas, one must also wait for good tide conditions before moving a floating home.

for the tugboat captain guiding the home. The outline of the home may prevent the captain (or captains, if multiple boats are required) from seeing hazards in the home's path. To address this concern, a captain may employ multiple people to act as "spotters" during the move.

In addition to the waterborne challenges associated with towing a floating home, the process of readying a home to be towed is long and resource-intensive. In many cases, an underwater inspection of the flotation device is required to ensure that it will survive transportation. The floating home also must be detached from its many connections to the land—not only its ties to the pier or pilings where it is moored, but also the connections for all of the home's utilities. The electrical connection generally must be detached by an electrician. Depending on the configuration of the sewer line, it may also be necessary for a diver to detach the home's sewage hookup.[22]

In view of these hazards and requirements, towing a floating home can be an expensive project. A floating home owner must engage the services of a tugboat, or another vessel with sufficient power to pull the home through the water. There are also labor costs; a move generally requires the work of four or five people. All told, moving a floating home over a relatively short distance can cost thousands of

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[22] Some floating homes are built on old flat-bottomed boats, barges, or other forms of hull flotation devices. Such homes are more easily towed through water from a hydrodynamic perspective. Laturnus 32. But they are still subject to the other obstacles to towing identified above, including their large profile, limited visibility, the need to detach utility connections, and so forth.

dollars. And circumstances may drive costs even higher. The size of the floating home or the conditions may necessitate multiple tugboats. In some cases, the path of the floating home is obstructed by its neighboring homes, which must be moved about like puzzle pieces to create a means of egress.

Not surprisingly, given the above, floating homes are rarely towed. Amici are not aware of any statistics on point, but veterans of the Sausalito and Seattle floating home communities estimate that an average home would only be towed a couple of times over its lifespan. New floating homes are sometimes constructed away from their moorage facility and then towed to their slip. On other occasions, however, floating homes are built in their slip. At the end of their lives, floating homes are often towed a short distance to be scrapped. And, infrequently, floating homes are towed to a new slip or moorage facility—sometimes upon the sale of the home. But this type of move is quite rare. Floating home moorage facilities are few in number, and it is difficult to find a vacant slip of the requisite size and with the appropriate utility connections. As a result, owners of floating homes, including new owners, generally keep their residence in the same slip where it has sat for decades.

II. THE EXISTING REGIME OF STATE AND LOCAL REGULATION OF FLOATING HOMES IS APPROPRIATE.

Notwithstanding the stationary nature of floating homes, their operation as an extension of the land, and the great difficulties associated with towing them, the Eleventh Circuit's test treats floating homes as "vessels" under 1 U.S.C. § 3. That result is inconsistent with the statutory text and with this Court's case law (*see* Br. for Petitioner 16–34), and it would trigger disruptive and undesirable consequences.

Floating homes are best governed by state and local regulation. The existing regulatory scheme is comprehensive, effective, and carefully tailored to the particular structural, cultural, and environmental attributes of floating homes. The existing regime is also consistent with this Court's longstanding recognition that state and local regulation is the favored framework for land use, a tradition that applies with force here given the distinctly local issues that inform the regulation of floating homes. The alternative scheme threatened by the Eleventh Circuit's test would impose on stationary residences an ill-fitting scheme designed for maritime transportation and commerce, and could make life difficult and confounding for floating-home residents in several ways.

A. The Existing State And Local Regulatory Scheme Successfully And Comprehensively Manages Floating Home Communities And Balances Local Priorities.

Floating homes are subject to a comprehensive regulatory regime at the state and local level. Two points about the existing regime are salient. First, existing regulation is extensive, requiring compliance not only with traditional building codes, but also with prescriptions specific to floating homes. Second, the existing scheme is carefully drawn. It was tailored over decades to balance local interests with respect to the unique considerations that floating homes implicate. The regulatory regimes and experiences in Seattle and Sausalito illustrate these two points.

1. Seattle, Washington

Washington State regulates floating homes as part of its statewide shoreline management. *See generally* Washington Shoreline Management Act (SMA), Wash. Rev. Code § 90.58.010 *et seq*. In refining the SMA over the years, the legislature has solicited the views of many stakeholders, and has twice invited a representative from the Seattle Association to testify at state legislative hearings. Although there has not always been agreement over shoreline management, and satisfying all interests is an ongoing challenge, the legislative process has allowed the Association to explain the history and significance of floating homes in Seattle and the need for a legal status that allows for their continued existence. The law now recognizes the special status of floating homes:

> The legislature recognizes that existing floating homes, as part of our state's existing houseboat communities, are an important cultural amenity and element of our maritime history. These surviving floating home communities are a linkage to the past, when our waterways were the focus of commerce, transport, and development. In order to insure the vitality and long-term survival of these existing floating home communities, consistent with the legislature's goal of allowing their continued use, improvement, and replacement without undue burden, the legislature finds that it is necessary to clarify their legal status.

Wash. Rev. Code § 90.58.270, note (2011).

The statutory revision implemented in view of this recognition classifies floating homes as a "conforming preferred use"—meaning that they must be regulated in a way that allows for their continued existence. *See* Wash. Rev. Code § 90.58.270(5)(b)(i) ("[A]pplicable development and shoreline master program regulations may only impose reasonable conditions and mitigation that will not effectively preclude maintenance, repair, replacement, and remodeling of existing floating homes and floating home moorages by rendering these actions impracticable.").

The City of Seattle implements Washington's Shoreline Management Act through a Shoreline Master Program (SMP), which imposes detailed requirements aimed at balancing the many environmental, recreational, and aesthetic interests affecting the city's shores. *See* Seattle Municipal

Code §23.60.002. Here, too, regulations were developed with input regarding the particular needs of various local stakeholders, including the floating home community and surrounding Seattle communities. Members of the Seattle Association participated in a Citizens' Advisory Committee for the SMP and met with city council members; one city representative came to walk the Association's docks to better understand how the law can properly account for floating homes' distinct qualities.

The SMP requires floating homes to comply with the city's building code for upland homes, plus numerous requirements specific to floating homes. *See id.* § 23.60.196. The requirements for floating homes include restrictions on the location, height, and square footage of floating homes, the distance between them, and the type and width of direct access that must be provided to a moorage walkway leading to a street.[23] *Id.* Because some floating homes in the Seattle area extend over state property, 131 floating home owners also currently have leases with the State Department of Natural Resources that impose additional restrictions aimed at environmental protection.

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[23] In addition, Seattle has a consumer protection ordinance that governs rent increases and other conduct by floating home moorages. Reinforcing the special local status of floating home communities, the stated aim of the ordinance is to "prevent harm to the public by protecting the stability, viability, and fiscal integrity of Seattle's unique floating home communities by preventing the eviction of floating homes from their moorages through arbitrary actions and unreasonable rent increases . . . ." Seattle Municipal Code § 7.20.020.

2. Sausalito, California

The floating home community in and around Sausalito, California is also subject to extensive regulation under state and local law. Recognizing the special status of floating homes, California treats them as residences and specifically excludes them from vessel status for purposes of state law. *See supra* at 5. Like Washington, California also protects floating home tenants. *See* Floating Home Residency Act, Cal. Civ. Code § 800 *et seq.* (governing rental agreements, tenancy terminations, and the sale or transfer of floating homes).

The special status of floating homes is paired with rigorous state regulation. Floating homes in the San Francisco Bay must comply with the San Francisco Bay Plan, *see* Cal. Gov. Code § 66600 *et seq.* (2011), implemented by the Bay Conservation and Development Commission (BCDC). The Bay Plan and accompanying state regulations strictly limit the construction and modification of floating homes and require a permit for the construction or "substantial modification" of floating homes. *See* Cal. Gov. Code § 66632(a) (permit requirement); *see also* San Francisco Bay Plan, *available at* http://www.bcdc.ca.gov/laws_plans/plans/sfbay_plan.shtml. Permits will be granted only if the project is either "(1) necessary to the health, safety or welfare of the public in the entire bay area, or (2) . . . consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect." *See* Cal. Gov. Code § 66632(f). The Commission has authority to grant permits subject to specific use, intensity, or construction conditions. *See id.* The Sausalito Association and other interested parties have actively worked with the

state legislature and the BCDC over the years to calibrate state-level regulation.

Local regulation is rigorous and even more detailed. Floating homes in the unincorporated areas of Marin County must obtain permits from the county and must comply with county regulations regarding design specifications and safety measures. *See* Marin County Code § 22.32.075(A). The regulations establish the maximum dimensions of floating homes: no more than sixteen feet above the water line, 46 feet long, and 20 feet wide. *Id.* §§ 19.18.050–051. The regulations also govern many other details of floating home life and construction. *See, e.g.*, *id.* § 19.18.150 (length and type of hose for water); *id.* § 19.18.290 (wiring methods and materials); *id.* § 19.18.280 (connection of fixtures and appliances); *id.* § 19.18.320 (measurement of stability on water). Floating homes in Marin County must also maintain specific types of fire prevention equipment and life saving equipment. *See id.* § 19.18.350.36.

Marin County's code also closely regulates the marinas in which floating homes are located. *See id.* § 22.32.070(C). In particular, at least 50 percent of the marina's total water area must be open water; there must be at least six feet between homes, and "particular emphasis shall be placed upon the view of the area from surrounding communities and protection of the water habitat." § 22.32.070(C)(1)–(5). Floating home marinas can have no more than ten vessels per acre and "shall not be allowed if [their] presence creates adverse effects on the surrounding communities or would be detrimental to water quality." *Id.* § 22.32.070(C)(6).

Nearby floating homes within the city of Sausalito must comply with a parallel set of detailed regulations. Floating homes[24] must have a certificate of occupancy from the city and may only be located in specific areas for which a conditional use permit has been issued. Sausalito Municipal Code §§ 16.08.040, 16.08.030. Every floating home must be "inspected and approved by the director of public works of the city" or another authorized individual "for the problems of buoyance, windage, stability and structure, and for compliance with" the regulations specific to floating homes. *Id.* § 16.08.030(A). Such regulations govern safety, utility connections, mooring equipment, and gangways.

Like Marin County, Sausalito also extensively regulates floating home marinas. The marinas not only must supply the city with detailed information regarding the floating homes (and residents) that are moored there, but also must follow specific requirements for garbage, parking, mooring, and pump-out facilities. Each marina is required to "achieve the best in personal safety and aesthetics for its individual problems." *Id.* § 16.08.060(D). All floating homes must float "at plus five feet above mean low water," unless an exception is made. *Id.* § 16.080.060(D).[25]

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[24] The Sausalito ordinance speaks of "houseboats," a term it broadly defines to include floating homes. *See* Sausalito Municipal Code § 16.08.020(B); *see also supra* at 6–7.

[25] Floating homes in other areas are subject to comparably extensive state and local regulatory regimes, each tailored to local considerations. In Portland, Oregon, for example, the city code "recognizes" its floating home community "as an important part of the City's overall vitality and livability"; requires permits and inspections for construction or modification of floating homes; requires each floating home to display a state-

The upshot of all of these provisions is an exacting regulatory scheme for floating homes in the San Francisco Bay Area, which has been crafted with input from floating home residents and many others. Over the years, state and local regulators have developed familiarity with the intricacies of floating homes, and this familiarity informs their regulations.

B. Treating Floating Homes As Vessels Would Create Needless Problems.

1. The existing regulatory scheme is consistent with the tradition of state and local regulation of land use.

The existing regime of state and local regulation of floating homes adheres to our system of federalism, which vests the States with "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. Eng'rs* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). This Court has long made clear that "regulation of land use [is] a function traditionally performed by local governments," *Hess* v. *Port Auth. Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994), and that "[r]egulation of land use . . . is a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006); *see also FERC* v. *Mississippi*, 456

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issued identification number visible from the access walkway; sets out detailed prescriptions for fire safety, life safety, electrical installations, and plumbing; and explicitly gives city authorities discretion to tailor decisions to the "distinctive design requirements" and "different environmental factors" that floating homes confront. Portland City Code § 28.01.010.

U.S. 742, 767–68 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.").

To be sure, federal regulations govern navigation and maritime commerce, *see United States* v. *Locke*, 529 U.S. 89, 107, 108 (2000), but local control of land use and shoreline decision-making—and floating homes in particular—has long been the norm. This arrangement enhances autonomy, democracy, and efficiency: It allows those with the closest vantage point to tailor regulation to unique aspects of environment, geography, and social and cultural preferences. Creative solutions to floating home regulation may vary between jurisdictions and "can be adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987); *see also* Felix Frankfurter, *The Public and Its Government* 49–50 (1930) ("[O]ur federalism calls for the free play of local diversity in dealing with local problems.").

2. Federal vessel status would senselessly disrupt the status quo and impose undue burdens on floating home residents.

Defining floating homes as vessels would disrupt the carefully drawn state and local regulatory scheme. In some circumstances, the newly applicable federal or maritime law requirements might preempt existing state and local regulations. Even absent preemption, vessel status could lead to undesirable consequences for owners and residents of floating homes. It would portend burdensome new regulations and confusing legal schemes designed primarily for maritime transportation.

1. *Maritime Lien Act.* As an initial matter, this case well illustrates one unfortunate result of federal vessel status: the availability of maritime liens against floating homes pursuant to the Federal Maritime Lien Act, 46 U.S.C. §§ 31301–43. *See* Br. for Petitioner 35–36. The Act's core provisions permit certain putative creditors to bring a civil action *in rem* to enforce a maritime lien on a vessel, 46 U.S.C. § 31342(a), and in some circumstances to have a vessel arrested without notice or a pre-arrest hearing, *see Amstar Corp.* v. *S/S ALEXANDROS T.*, 664 F.2d 904, 912 (4th Cir. 1981). The rationale behind this extraordinary provision is that vessels might otherwise "escap[e] their debts by sailing away." T. Schoenbaum, Admiralty and Maritime Law, § 9-1, at 516 (4th ed. 2004); *see also Amstar Corp.*, 664 F.2d at 912. But the provision has no reasonable application to floating homes, which cannot move at all without significant burden, danger, and equipment. *See supra* at 17–21.

In addition to lacking any basis in the Act's purpose, allowing maritime liens against floating homes would undermine state interests and violate the sanctity of the home. Floating homes, as residences, would otherwise be protected by state homestead exemptions, which allow individuals to protect their residences from creditors in certain circumstances. *See* Wash. Rev. Code § 6.13-040 (Washington homestead exemption);[26] Cal. Code Civ. Proc. § 704.720 (California homestead exemption).

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[26] "The homestead exemption creates an interest in property that attaches to the surplus proceeds from a nonjudicial foreclosure sale under a deed of trust such that a judgment creditor's claim is limited to funds in excess of the homestead, if any." *Sweet* v. *O'Leary*, 944 P.2d 414, 415 (Wash. App. 1997).

Homestead laws "are designed to protect the sanctity of the family home against a loss caused by a forced sale by creditors" and to "preserv[e] the home for the family." *E.g.*, *Title Trust Deed Serv. Co.* v. *Pearson*, 132 Cal. App. 4th 168, 174 (2005); *cf. McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3105 (2010) ("[O]ur law has long recognized that the home provides a kind of special sanctuary in modern life."). These laws are founded in a "strong public policy" and therefore require "liberal construction." *Title Trust*, 132 Cal. App. 4th at 174. There is no good cause for allowing maritime liens to upend this protective scheme.

2. *Maritime safety statutes and regulations.* Defining floating homes as vessels could trigger the extensive federal law pertaining to maritime safety.[27] Depending on the precise provisions at issue, some of these federal requirements might preempt local ordinances regarding floating homes. *See generally, e.g.*, 46 U.S.C. § 4306 (preempting state regulation of "performance or other safety standard[s]" for recreational vessels and state "requirement[s] for associated equipment" unless identical to federal regulation); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 69 (2002) ("The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations . . . ."); *Locke*, 529 U.S. at 110 (Title I of Port Safety and Waterways Act preempts conflicting state laws).

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[27] *See, e.g.*, 46 U.S.C. § 4301 *et seq.* (Federal Boat Safety Act); 33 C.F.R. Chapter 1, Subchapter S (boating safety regulations); 46 U.S.C. § 2101 *et seq.* (codification of shipping laws); *id.* § 115 (defining "vessel" for purposes of Title 46 as having the meaning given that term in 1 U.S.C. §3); 33 U.S.C. § 1223 (authorizing Secretary of Transportation to regulate vessels).

Even apart from preemption, federal vessel status raises the specter of burdensome and ill-fitting new requirements for floating homes. For example, the Federal Boat Safety Act authorizes the Coast Guard to prescribe regulations for recreational vessels

> requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, lifesaving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) . . . and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section[.]

46 U.S.C. § 4302(a)(2). Pursuant to this Act, the Coast Guard "has promulgated a host of detailed regulations." *Sprietsma*, 537 U.S. at 60. These prescriptions could obligate floating homes, *inter alia*, to have navigation lights, *see* 33 C.F.R. §§ 183.801–810, hull identification numbers, 33 C.F.R. § 181.29, and "compliance certification" labels from manufacturers, 33 C.F.R. § 181.7. Such requirements may be a sound way of managing maritime safety and commerce, but they have no sensible application to floating, land-affixed residences.

Federal regulations also require affirmative conduct on the part of vessel operators. For example, Coast Guard regulations require detailed reporting of accidents that occur on certain vessels if a person requires medical treatment (beyond first aid) or property damage exceeds $2,000. 33 C.F.R. § 173.55. The report must include some 26 categories of information, including weather forecasts and

opinions of the person making the report. *See id.* § 173.57. This might mean that mishaps or injuries in a floating home, or ordinary property damage (a broken refrigerator, a leaky roof) would require a detailed report to the government. It is unlikely that Congress intended to impose such an intrusive requirement on land-affixed residential dwellings simply because they can float.

3 *Employment law.* Federal vessel status could also impose the unique requirements of maritime law onto employment relationships in floating homes. Maritime law confers upon "seamen"—certain workers on vessels, *see Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 354 (1995)—a series of legal protections that would not make sense in the domestic context of land-affixed floating homes. *See* Br. for Petitioner 39–41. To the extent that nannies, house cleaners, and others who work on floating homes are found to be seamen, they would be afforded, *inter alia*, an inapposite cause of action for "unseaworthiness" and a right to recover "maintenance and cure"—the provision of food, lodging, wages, and medical care—for injuries incurred while working on the vessel, *see generally Atl. Sounding Co., Inc.* v. *Townsend*, 129 S. Ct. 2561, 2568 (2009). Consideration of the latter doctrine underscores the absurdity of importing maritime law into land-affixed homes: It would be odd to say the least if this indefinite obligation of support, born of the perils of life at sea, were owed to those who happen to become injured while working on a land-affixed floating home.

4 *Tort law.* Federal "vessel" status could also burden floating homes with the complex web of maritime tort doctrines. Some of these legal rules,

like the limitation of liability afforded to admiralty defendants through the Limitation of Vessel Owners' Liability Act, 46 U.S.C. § 30505, would ostensibly benefit owners of floating homes by limiting their exposure in tort suits. Other doctrines would be more likely to work against owners of floating homes—like the duty of reasonable care owed to visitors upon vessels, *see Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 631–32 (1959), the "salvage" doctrine requiring compensation to those who save a vessel or its cargo from peril in certain circumstances, *see The Blackwall,* 77 U.S. (10 Wall.) 1, 12 (1869), or the ability of admiralty tort plaintiffs to sue the vessel in an *in rem* action where the owner would not be liable, *see* Schoenbaum on Admiralty, § 21-3, at 400. From the perspective of floating home owners, however, the most salient result would be utter confusion regarding the applicable legal rules. There is no good cause for subjecting land-bound homeowners to the topsy-turvy world of sea-based tort doctrines simply because their homes can float.

CONCLUSION

For the reasons stated above and in the Petitioner's brief, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-626

In The Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTEREST OF AMICI CURIAE[1]

Amici are 36 present or former professors of admiralty and maritime law at law schools throughout the United States. Individual biographical sketches are set forth in alphabetical order in the Appendix. Amici appear here in their capacity as independent professionals – individual teachers and scholars – rather than on behalf of the various institutions with which they are affiliated.

The interest of amici in the present case is solely that of concerned scholars. In the coming years, amici will teach students about vessel status, and the issue will arise in their scholarly work. They accordingly wish to help the Court avoid beclouding or unduly restricting the 1 U.S.C. § 3 definition of "vessel" that was confirmed and explained in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). In teaching admiralty to students – and for some amici, in scholarly works published in the period since *Stewart* was handed down – *Stewart*'s explication and endorsement of 1 U.S.C. § 3 has been a relatively clear and orderly area in a sometimes confusing field.

Collectively, amici have a great deal of expertise in maritime law. They believe that the interests of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel contributed money to the preparation or submission of this brief. The parties have consented to the filing of all amicus briefs; their consent letters have been filed with the Clerk.

clarity, stability, and uniformity in the application of federal maritime law will be best served if this Court substantially follows the Eleventh Circuit's understanding of 1 U.S.C. § 3 and *Stewart* and affirms the judgment below.[2]

SUMMARY OF ARGUMENT

Section 3 of the Rules of Construction Act, 1 U.S.C. § 3, defines the term *vessel* to "include[ ] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005), held that § 3 "suppl[ies] the default definition of 'vessel' throughout the U.S. Code." *Stewart* further held that, while § 3 "sweeps broadly" a watercraft is not a § 3 vessel if it has been "rendered practically incapable of transportation or movement." *Id.* at 494.

In the course of holding that a houseboat/barge was a § 3 vessel for purposes of establishing the

[2] Because this Court reviews judgments, not opinions, and the Eleventh Circuit's judgment was correct, this Court should affirm. In any event, the court of appeals' reasoning is substantially correct, notwithstanding petitioner's quibbles with some of the Eleventh Circuit's language. This Court has often affirmed courts of appeals' judgments while expressing disagreement with some of the reasoning below, including in maritime cases. *See, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 863 (1986).

district court's admiralty jurisdiction, the Eleventh Circuit held that the intentions of the craft's owner – petitioner – should play no role in determining the craft's vessel status. That ruling was correct. Bringing a watercraft owner's subjective intentions into the vessel status analysis is precluded by 1 U.S.C. § 3, by this Court's decisions interpreting and applying 1 U.S.C. § 3, and by multiple cogent policy reasons. The Government agrees that a craft owner's subjective intentions should play no role in the vessel-status inquiry.

The irrelevant issue of a watercraft owner's intentions respecting the craft's uses is not to be confused with the relevant question whether a watercraft's physical characteristics and situation enable the craft to be used for transportation ***purposes***. Standard dictionaries define the noun *purpose* to mean "the object toward which one strives or for which something exists." The first half of that definition has a subjective focus, referring to a person's intentions. The focus of the second half is objective, referring to a thing's physical and situational characteristics. In the vessel-status context, a watercraft's objective purposes matter; its owner's subjective purposes or intentions do not.

Setting aside petitioner's subjective intentions as irrelevant, the Eleventh Circuit determined that respondent produced substantial evidence that the houseboat/barge had practical transportation purposes and capability, whereas the petitioner produced no evidence to refute respondent's showing. The record

supports that determination. Therefore, the Eleventh Circuit's decision should be affirmed. A remand would serve no purpose, because – aside from petitioner's irrelevant intentions – nothing that petitioner has asserted in his narrative to this Court can offset respondent's showing that the houseboat/barge had demonstrated its practical transportation capability.

In affirming the decision below, this Court should make clear that owner-intent arguments are completely off limits. Any regime that attempts to treat shipowners' subjective intentions as relevant but not controlling – or any similar regime insisting on objective corroboration of shipowners' claims about their intentions – would be unstable. Several lower-court decisions indicate that owner-intent arguments, once countenanced, are likely to dominate the discussion and become the court's focus. Watercraft owners' assertions respecting their own intentions are potentially self-serving and inherently manipulable. And however plausible, reasonable, or even undeniable a watercraft owner's intentions may be today, they can change tomorrow. The objective characteristics of putative vessels, on the other hand, cannot be changed nearly as readily, easily, or often. *Compare De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006) (holding that a fully operational and navigable casino boat lost vessel status when its owner decided to cease cruising and operate only at the dock) *with Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) (holding that a liberty ship lost vessel

status only when its owner cut a large hole in its hull in order to convert it into a fish processing plant).

ARGUMENT

I. Respondent Presented Significant Evidence of Vessel Status

A. The *Stewart*/Section 3 Test

Section 3 of the Rules of Construction Act, 1 U.S.C. § 3, dates from 1873. It provides in its entirety: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." In its unanimous decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005), this Court held that § 3 "suppl[ies] the default definition of 'vessel' throughout the U.S. Code." The *Stewart* Court noted with apparent approval that "§ 3 sweeps broadly." *Id.* at 494.[3] Synthesizing the jurisprudence reflecting the § 3 test, the Court said that a watercraft is not a vessel "if it has been permanently moored or otherwise rendered practically incapable of transportation or movement," *id.* at 494, and that the

[3] The breadth of the § 3 definition is evident on the face of the statutory terms "every description," "other artificial contrivance," and "capable of being used." Moreover, as the Government points out (at 23 n.7), the statutory term "includes" seems to add to or emphasize the breadth of the definition, because that term usually signals the introduction of an illustrative rather than exhaustive listing.

vessel-status inquiry "remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496.

B. Respondent Presented Substantial Evidence of Vessel Status

The record contains a considerable amount of evidence pointing to the conclusion that petitioner's craft was "used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Moreover, that evidence showed that the craft had not been "permanently moored or otherwise rendered practically incapable of transportation," *Stewart*, 543 U.S. at 494, and thus that it had the practical capability of being used as a means of transportation on water.

1. Pursuant to Supplemental Rule C(2) of the Federal Rules of Civil Procedure, respondent filed a verified complaint (JA 4-36) that set forth multiple attributions of vessel status and vessel characteristics to petitioner's craft. "A verified complaint may be treated as the functional equivalent of an affidavit,"[4] and courts have characterized verified pleadings as "evidence" in *in rem* maritime and forfeiture proceedings.[5]

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[4] 10 CYCLOPEDIA OF FEDERAL PROCEDURE § 35.31 (3d ed. supp. 2012).

[5] *See United States v. Forty Thousand Dollars*, 763 F. Supp. 1423, 1427 (S.D. Ohio 1991).

2. When petitioner purchased the craft, the bill of sale described it as a "Homemade Custom Houseboat/ Barge." JA 79. The houseboat/barge[6] is pictured most clearly in the photograph at JA 69.[7] Other photographs are at JA 12, 31-33, 44-66.

3. In the dockage contract entered into by petitioner and respondent on March 10, 2006 (JA 13-21), petitioner signed off on the status of his watercraft as a "houseboat" and a "vessel." Moreover, the contract obligated petitioner to move the watercraft whenever required to do so by marina management, thus making the craft's mobility an essential element of petitioner's contractual obligation. JA 13-14.

4. On two occasions during the houseboat/ barge's moorage at North Bay Village, petitioner towed the craft short distances among different marinas. Pet. App. 3a n.2, 18a. The houseboat/barge also engaged in three long journeys under towage: It was towed for at least 200 miles from the Fort Myers vicinity on Florida's west coast to North Bay Village on the east coast, *id.* at 3a; it was towed (with

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[6] Petitioner tries hard (at 2-4) to persuade the Court that his craft was the equivalent of a Seattle-style "floating home." But the Floating Homes Associations refute petitioner's claim, stating (at 6 n.5) that "[f]loating homes are . . . distinct from 'house barges,' which are floating residences that, unlike floating homes, are specifically designed to be towed."

[7] Petitioner states (at 3) that petitioner's craft "looked like a house on land." But in the photograph at JA 69, the craft looks nothing like a house on land; it looks exactly like what it was, a houseboat/barge under tow across navigable water.

petitioner and presumably the craft's furniture and household appliances aboard) for about 70 miles from North Bay Village to Riviera Beach, *id.* at 3a, 18a, 19a n.9; and (again with furniture, appliances, and a riding crew) for about 80 miles from Riviera Beach to Miami, *id.* at 8a, 18a. During this 80-mile tow, the craft sustained no damage. JA 39.

5. Both the survey of petitioner's houseboat/barge conducted at Riviera Beach before its arrest (JA 31-33) and the survey conducted at Miami after the arrest (JA 37-66) describe the houseboat/barge in some detail. The photographs and text constituting the surveys reveal a number of vessel-like attributes.

II. The Courts Below Correctly Ruled That Petitioner Presented No Evidence to Refute Respondent's Evidentiary Showing of Vessel Status

A. The District Court

The district court began its treatment of the vessel status of petitioner's houseboat/barge by summarizing the relevant jurisprudence, comprising this Court's *Stewart* decision and the binding circuit precedent in *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008), *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1978), and *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir.

1955).[8] The district court's synthesis of those decisions led it to the following correct conclusions: (a) In determining vessel status, the "primary focus" should be "whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one and whether the vessel was rendered practically incapable of transportation or movement."[9] (b) "[T]he owner's intent" is not a proper focus of the inquiry.[10] (c) "[A] houseboat that [can] only move under tow [is] still a vessel for jurisdictional purposes."[11] (d) A showing that a watercraft might sustain damage during towage is not necessarily fatal to vessel status.[12] (e) State law treating a watercraft as a nonvessel does not preclude the craft's vessel status under federal maritime law.[13] (f) A watercraft's lack of Coast Guard certification as an operational vessel does not preclude the craft's vessel status.[14] (g) "*Pleason* held that a boat that had a deck, cabins, and a superstructure, was capable of being used as a

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[8] *Miami River* and *Pleason* were binding circuit precedent because *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), held that all former Fifth Circuit opinions prior to October 1, 1981, are binding precedent in the Eleventh Circuit.

[9] Pet. App. 41a (internal quotation marks and citations omitted).

[10] *Id.* at 40a.

[11] *Id.*

[12] *See id.* at 42a.

[13] *Id.*

[14] *Id.*

means of transportation and therefore subject to admiralty jurisdiction though it had no motor power of its own and no steering."[15]

The district court then turned to the facts of the present case, stating: "We . . . find that Mr. Lozman has put forth no evidence that would convince us that the vessel at issue is substantively different than the vessel [in] *Pleason*."[16] Implicitly, the court was contrasting petitioner's lack of relevant evidence of nonvessel status with the substantial showing of vessel status made by respondent (and summarized in Section I-B, *supra* at 6-8). Amici believe that the court's evaluation of the evidence was correct. The Eleventh Circuit opinion provides more details respecting the petitioner's scanty evidentiary showing and thereby serves to heighten the correctness of the district court's conclusion.

B. The Eleventh Circuit

The Eleventh Circuit's opinion synthesized *Stewart*, *Belle of Orleans*, *Miami River*, and *Pleason* in much the same way as the district court. *See* Pet. App. 12a-17a. It described the essence of *Pleason* thusly:

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[15] *Id.* at 41a.

[16] *Id.*

> The Carol Ann was afloat and capable of being towed, had a deck, cabins, and superstructure, and therefore was capable of being used as a means of transportation under tow despite having no steering mechanism and no motive power of its own.[17]

Of *Miami River*, the court stated:

> [T]he former Fifth Circuit concluded that a houseboat with no motive power of her own that was used as a residence in a marina was still a vessel. The undisputed facts showed that the houseboat had made the rather considerable maritime voyage to libellant's shipyard in Miami with the expectation that she would be towed away. The Court noted that a houseboat affords a waterborne place to live with the added advantage of at least some maritime mobility. Accordingly, that she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel.[18]

And the court thought *Belle of Orleans* was an easy case, because "the riverboat at issue [not only was] factually indistinguishable from the vessel in *Pleason*, [but also] had a working engine and other machinery and therefore motive power of its own."[19]

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[17] Pet. App. 14a (internal quotation marks and citations omitted).

[18] *Id.* at 14a-15a (internal quotation marks and citations omitted).

[19] *Id.* at 15a.

(The vessel status of the *Belle of Orleans* riverboat was also made easy by the fact that it was "fully operational," had a Coast Guard certificate authorizing it to carry passengers, and "maintained a captain and a crew aboard."[20])

Like the district court, the Eleventh Circuit specified that several of petitioner's arguments against vessel status were irrelevant. The court said that petitioner's state-law,[21] owner intent,[22] Hull Identification Number,[23] and Coast Guard non-certification arguments were all irrelevant.[24]

The Eleventh Circuit then turned to its consideration of the evidence. The court made specific reference to respondent's evidence of vessel status that is summarized in Section I-B, *supra* at 6-8. Pet. App. 3a-4a, 7a-8a, 17a-18a. And it then specifically detailed petitioner's lack of countervailing evidence. The Eleventh Circuit said that petitioner's claim that the houseboat/barge sustained damage from being towed was "without any evidentiary support," and that "absent a shred of evidence" the claim could not preclude vessel status. *Id.* at 18a. It said that petitioner's claim that the craft was built with land-based materials and methods was "again without any

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[20] *Belle of Orleans*, 535 F.3d at 1302, 1304.

[21] *See* Pet. App. 12a n.6, 17a.

[22] *See id.* at 16a.

[23] *See id.* at 20a.

[24] *Id.*

record support." *Id.* at 18a-19a. And it said that petitioner's assertion that the watercraft was not practically capable of moving over the water, even by tow, was "contradicted by the record." *Id.* at 19a.

In *Stewart,* this Court said that "[i]n some cases, [the vessel-status] inquiry may involve factual issues for the [trier of fact]." 543 U.S. at 496. If petitioner had presented adequate evidence of the relevant facts that he relies on in his (largely evidence-bereft) narrative to this Court, vessel status might have been a question of fact in the district court. But without any evidence from petitioner,[25] the only evidence

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[25] Petitioner (at 42) refers to five factors used by the Coast Guard to assess the "permanently moored" status of "Craft Routinely Operated Dockside," 74 Fed. Reg. 21,814 (May 11, 2009). But in the lower courts, petitioner did not mention those factors, much less present evidence as to how the situation of his houseboat/barge while stationary at Riviera Beach would have been characterized under the Coast Guard's approach.

If petitioner had directed the attention of the courts below to the Coast Guard factors, the houseboat/barge should still not have been considered "permanently moored" at Riviera Beach. The five factors, *see id.* at 21,815 – with the answers (in bold) that are indicated by the record evidence taken together with the factual claims in petitioner's narrative to this Court – are as follows:

> "Is the craft surrounded by a cofferdam, land or other structure, such that although floating, it is in a 'moat' with no practical access to navigable water?" **No.**
>
> "Is the craft affixed to the shore by steel cables, I-beams or pilings, or coupled with land-based utility connections for power, water, sewage and fuel?" **No. The "cables" used here were actually "ropes" (JA 32) that were easily cut or untied; there**

(Continued on following page)

before the courts below was the considerable body (summarized in Section I-B, *supra* at 6-8) supporting the conclusion that the houseboat/barge had the practical capability of transporting itself and its contents across navigable water. Under those circumstances, the courts below had no realistic choice but to uphold vessel status on the record and in the procedural posture in which the question was presented to them.

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were no I-beams, pilings, or sewage connections; and the power and water came to the craft via an ordinary extension cord and what amounted to a garden hose.

"If the craft were operated in navigation, would it be thereby endangered because of its construction?" **If petitioner's evidence-bereft narrative is credited, the houseboat/barge suffered some damage (quickly repaired) on the 200-mile tow from the west to east coast of Florida and was endangered on the 70-mile tow from North Bay Village to Riviera Beach. But there was no damage, no danger, and no trouble of any kind on the 80-mile tow from Riviera Beach to Miami. JA 39.**

"What is the purpose, function, or mission of the craft?" **Petitioner's answer is "residence." The answer suggested by *Miami River* is "a waterborne place to live with the added advantage of at least some maritime mobility." 390 F.2d at 597.**

"Can the craft get underway in less than eight (8) hours?" **Yes; on the tow from Riviera Beach to Miami, it was disconnected from its moorings and underway in a matter of minutes.**

III. The Courts Below Were Correct to Reject the Relevance of Owner Intent

Both the district court and the Eleventh Circuit were emphatic in rejecting any suggestion that petitioner's subjective intentions for the use of the houseboat/barge were important to the vessel-status inquiry. The courts were correct to do so.

A. There Is No Statutory Support for an Owner-Intent Approach

As shown in Section I-A, *supra* at 5-6, 1 U.S.C. § 3 defines vessel status without any indication that an inquiry into the subjective intentions of a watercraft's owner is part of the definition or analysis. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). And Congress has shown that it knows how to make a watercraft's owner's intent relevant when it wishes to do so. Many statutory definitions of "vessel" include specific reference to an intent component that is not present in 1 U.S.C. § 3. *See, e.g.*, 49 U.S.C. § 13102(25) ("The term 'vessel' means a watercraft or other artificial contrivance that is used, is capable of being used, or *is intended to be used,* as a means of transportation by water.") (emphasis added); 16 U.S.C. § 6901(7) ("The term 'fishing vessel' means any vessel used *or intended for use* for the purpose of fishing, including support ships, carrier vessels, and any other vessel directly involved in such fishing operations.") (emphasis added); 16 U.S.C. § 5502(4)

("The term 'high seas fishing vessel' means any vessel of the United States . . . used *or intended for use* [in specified ways].") (emphasis added). The wording of 49 U.S.C. § 13102(25) is particularly notable because it almost exactly reproduces the wording of 1 U.S.C. § 3, but adds the phrase "or is intended to be used."

If this Court were to construe the § 13102(25) term "used" or its term "capable of being used" as including an intent element, the phrase "intended to be used" in that statute would be superfluous. But this Court "construe[s] statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).[26] Thus, the Court should construe those terms to exclude intent. Because those same terms appear alone in 1 U.S.C. § 3, the Court should similarly construe that section to exclude an intent component. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (construing the term "owned" in 28 U.S.C. § 1603(b)(2) to refer to direct ownership when other provisions in titles 5, 12, and 15 of the U.S. Code expressly referred to direct or indirect ownership); *cf. Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

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[26] *See also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting.") (citations and internal quotation marks omitted).

B. There Is No Support in This Court's Decisions for an Owner-Intent Approach

Just as § 3's language excludes owner intent from its definition of "vessel," *Stewart* gives no indication that the intent of a watercraft's owner is relevant to determining the craft's status as a vessel in maritime law. Nor do any of the other cases that petitioner purports to rely on. On certiorari, petitioner argued (at Pet. 25-28) that *Perry v. Haines (The Robert W. Parsons)*, 191 U.S. 17, 30 (1903), *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), *Roper v. United States*, 368 U.S. 20, 23 (1971), and *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 626-27 (1887), provide support for what petitioner called (at Pet. 26) a "purpose-based test" for vessel status, but that argument entails some misdirection. None of those cases includes any language that would support factoring a vessel owner's subjective intent into the process of assessing vessel status.

The heart of the matter is the *Robert W. Parsons* pronouncement that "neither size, form, equipment, nor means of propulsion are determinative factors upon the question of [vessel status], which regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. at 30. The language and context of the *Parsons* pronouncement demonstrate that the term "purpose" referred not to the owner's intentions for the use of the craft but to the craft's own design and natural function.

Standard dictionaries define the noun "purpose" to mean "the object toward which one strives *or for which something exists.*" *American Heritage Dictionary of the English Language* 1062 (1981) (emphasis supplied).[27] The first half of that definition is subjective, inquiring into a person's intentions; the second half is objective, examining an object's design and suitability for particular uses. All of this Court's cases that might be read in support of a purpose-based inquiry consider only the objective sense of the term; none suggests it is appropriate to consider a watercraft owner's subjective intentions when assessing the craft's vessel status.

C. The Handful of Lower-Court Decisions Focusing on Owner Intent Were Wrongly Decided

The American Gaming Association (at 9-12) sets forth eight post-*Stewart* cases in which arguably operational riverboat casinos – placed in some "indefinitely moored" status once state legislatures allowed gaming on stationary craft – were ruled not to be vessels. In five of those cases, the courts placed significant reliance on the casino owners' announced intentions to sail no more. *See De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir.

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[27] *See also Webster's Unabridged Dictionary* 1465 (2d ed. 1975) (defining the noun "purpose" to mean "that which a person sets before himself as an object to be reached" as well as "*the object for which something exists*") (emphasis supplied)).

2006);[28] *RDI/Caesars Riverboat Casino, Inc.*, 896 N.E. 2d 1172, 1179-81 (Ind. App. 2008); *Earls v. Belterra Resort, Indiana, LLC*, 439 F. Supp. 2d 884, 887, 890 (S.D. Ind. 2006); *Ford v. Argosy Casino Lawrenceburg*, 2008 WL 817113, at *2, *5 (S.D. Ind. March 24, 2008); *Wire v. Showboat Marina Casino Partnership*, 2008 WL 818310, at *5-*7 (N.D. Ind. March 20, 2008). An additional similar case is *In re American Milling Co.*, 2008 WL 2727257 (E.D. Mo. July 10, 2008).

For multiple reasons, amici believe that the foregoing six cases were wrongly reasoned,[29] and at

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[28] The Government agrees (at 25-26 & n.10) that *De La Rosa* was wrongly decided.

[29] Neither *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), nor *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), is in the disapproved category. *Tagliere* has sometimes been cited as approving the relevance of owner intent in determining the vessel status of a presently nonsailing casino boat, but the relevant passage, 445 F.3d at 1016, is equivocal and arguably has the opposite meaning of questioning the propriety of an owner-intent approach. In *Pavone*, the court made no overt references to owner intent and based its nonvessel conclusion on the objective physical characteristics of the casino in question – physical characteristics that showed a much more substantial connection to the land than petitioner can claim here. *See* 52 F.3d at 564, 570.

In *Stewart*, this Court cited *Pavone* alongside *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992), for examples of watercraft "permanently moored or otherwise rendered practically incapable of transportation or movement." 543 U.S. at 494. *Kathriner* similarly turned on the objective physical characteristics of the watercraft in question. The craft involved was a liberty ship that lost vessel status when its owner cut a large hole in its hull in order to convert it into a fish processing plant.

least four of them were wrongly decided.[30] Analysis of 1 U.S.C. § 3 (*see* Section III-A, *supra* at 15-16) shows that Congress has not approved reliance on owner intent in determining vessel status. This Court's cases discussed in Section III-B, *supra* at 17-18, eschew owner-intent inquiries. And Section III-D, *infra* at 20-23, explains that, on multiple policy grounds, allowing owner-intent inquiries into the analysis of vessel status would create unnecessary confusion and trouble to no good purpose.

D. An Owner-Intent Approach Should Be Precluded on Policy Grounds

In addition to being precluded by Congress and by this Court's decisions in *Stewart* and the *R.W. Parsons* line of cases, an owner-intent approach to determining vessel status is an almost self-evidently bad idea. As the Eleventh Circuit noted in *Belle of Orleans* and again in the decision below, the use of owner intent would run counter to the goal of "uniform application of general maritime law" and be "incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction." *Belle of Orleans*, 535 F.3d at 1311; *see also* Pet. App. 16a. Further, an owner's intent for a watercraft can

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[30] Because the opinions in *Wire* and *American Milling* provide little information about the crafts' physical moorings, it cannot be said with certainty whether the courts' heavy reliance on the owners' subjective intent was determinative or merely improperly influential.

easily change, which would lead to watercrafts' moving in and out of vessel status on an unpredictable basis, depending perhaps on the owner's self-interest at the critical time. *Belle of Orleans*, 535 F.3d at 1311-12; Pet. App. 16a. And in *Stewart*, this Court noted that vessel-status criteria allowing watercrafts to move readily between vessel and nonvessel status would constitute "the sort of 'snapshot' test [for seaman status] that we rejected in [*Chandris, Inc. v. Latsis,* 515 U.S. 347, 363 (1995)]." 543 U.S. at 495. The *Stewart* Court explained:

> Just as a worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured," *Chandris*, 515 U.S. at 363, neither does a watercraft pass in and out of [vessel status] depending on whether it was moving at the time of the accident.

Id. at 495-96. By the same token, a watercraft should not pass in and out of vessel status depending on whether its owner has formulated an intention to sail no more or to resume sailing. As the Government explains (at 24), vessel status should depend upon "real-world circumstances . . . , not what is in the owner's head."

Furthermore, the owner-intent factor is inherently self-serving and "subject to manipulation in litigation."[31] For example, unscrupulous vessel owners could manipulate the owner-intent inquiry to defeat vessel status in order to frustrate the expectations of lenders relying on preferred ship mortgages (*see* 46 U.S.C. § 31322) or of suppliers relying on maritime liens for necessaries (*see* 46 U.S.C. § 31342). And of course, a watercraft owner need not be deemed unscrupulous for manipulating an inherently manipulable litigation tool. Riverboat casino owners, for example, will often be able to make plausible owner-intent arguments when wishing to defeat vessel status. *See, e.g., De La Rosa*, 474 F.3d at 187-88. But they can also eschew any mention of owner intent when seeking to affirm vessel status. *See In re Silver Slipper Casino Venture LLC*, 264 Fed. Appx. 363 (5th Cir. 2008) (rejecting casino boat owner's assertion of vessel status without any owner-intent inquiry or reference). It is much more difficult for an owner to change the objective characteristics of a putative vessel so readily, so easily, or so often. *See, e.g., Kathriner v. Unisea, Inc.*, 973 F.2d 687 (9th Cir. 1992) (holding that a liberty ship lost vessel status when its owner cut a large hole in its hull in order to convert it into a fish processing plant).

Finally, the goals of uniformity, stability, and clarity of federal maritime law would be ill-served by

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[31] U.S. Brief 26.

a regime acknowledging the relevance of a watercraft owner's subjective intentions while insisting on some objectively plausible basis for the asserted intentions. The cases treated in Section III-C, *supra* at 18-20, indicate in the aggregate that, once an owner-intent inquiry comes into play, it tends to dominate the discussion and ultimately the courts' reasoning. (This is perhaps especially evident in *De La Rosa*, 474 F.3d at 187-88,[32] and *RDI/Caesars*, 896 N.E. 2d at 1179-81.) The plain fact is that allowing any sort of owner-intent-based inquiry will do a great deal of harm without bringing anything useful to the inquiry; the objective factors that might be used to verify the plausibility of an owner-intent assertion are themselves the kinds of data that are grist for the *Stewart*/§ 3 approach. The best approach is to rule subjective owner intent out of play altogether.

E. The Government Opposes the Owner-Intent Approach

The Government (at 24-26) presents a potent summary of the arguments against an owner-intent-based approach to determining vessel status. In that subsection of its brief, the Government explains that an owner-intent approach is not authorized by 1 U.S.C. § 3 or by this Court's decisions in *Stewart*, *Evansville*, *Cope*, or *Roper*. It further notes (at 26)

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[32] The Government indicates (at 25-26 & n.10) that the *De La Rosa* decision was controlled by the owner-intent factor.

that an owner-intent approach would be inconsistent "with the Court's recurring concern about having a 'watercraft pass in and out of' vessel status." And it concludes by noting that an owner-intent approach is "subject to manipulation in litigation and [would also resist] consistent application by regulatory agencies." *Id.*

IV. The Decision Below Should Be Affirmed

A. Rendering Judgment on the Present Record That Petitioner's Craft Was Not a Vessel Would Be Improper

The analysis of the record evidence presented in Sections I-B and II, *supra* at 6-14, demonstrates the seeming impossibility – short of a radical change in the law of vessel status – of ruling on the present record that petitioner's houseboat/barge was clearly not a vessel. The Government further shows (at 30-31) that for this Court to reverse and render judgment for petitioner would entail a fundamental alteration of vessel-status law.[33] As amici see the

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[33] The three maritime law professors supporting petitioner argue for a reverse-and-render outcome only by largely ignoring the record and, more importantly, by indirectly endorsing the relevance of a watercraft owner's subjective intentions for the craft's future use. For indications that those amici have largely ignored the record, *see* the multiple references to petitioner's craft as a "floating house" at 4, 5, 10, 11, 12, 13, 14, 16, 17; the assertion (at 10) that petitioner's craft was a "more-or-less permanent extension[ ] of the shore"; and the statement (at 18) that petitioner's craft was "never intended for moving people or

(Continued on following page)

situation, the only way in which petitioner could be entitled to a nonvessel ruling at this stage would entail ascribing controlling effect to his subjective intentions to keep the houseboat/barge moored at Riviera Beach on a permanent or indefinitely long-term basis, even though he was not entitled to remain there permanently or indefinitely under his contract.

B. Vacating and Remanding Would Be Unjustified, Unnecessary, and Impractical

1. Houseboats Are Routinely Treated As Vessels.

In *Stewart*, this Court indicated that how an apparatus or structure is "commonly thought of" can be a significant consideration respecting the thing's status as a vessel. 543 U.S. at 494. Petitioner bought a floating apparatus termed in the bill of sale a "houseboat/barge," and he almost immediately used it as a houseboat/barge by towing it across 200 miles of navigable water from the west to the east coast of Florida. JA 79; Pet. App. 3a. It is accordingly difficult

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things across water." For the indirect endorsements of the relevance of a watercraft owner's subjective intentions, *see* 3 ("intentionally . . . moored"); 12 (indicating that petitioner had "no intent for [the craft] to ever leave"); 12-13 (signaling as "especially" important "the purpose [for] which [the craft] will be used for the indefinitely foreseeable future"); 20 (again emphasizing that the craft would "not be . . . used [for transportation] for the foreseeable future").

to understand how petitioner can plausibly deny that his watercraft was a houseboat, at least for a while.[34]

Nor can petitioner effectively deny that houseboats are commonly thought of as vessels. According to the thorough and perceptive analysis in *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, 2010 AMC 404, 413 (D.N.J. 2009), "[e]very court to have considered the question has found floating homes [and other types of houseboats] to be vessels."[35] For academic confirmation that the vessel status of all types of houseboats is generally assumed, *see* George Rutherglen, *Dead Ships*, 30 J. MAR. L. & COM. 677, 678 n.2 (1999) ("Houseboats present [a] borderline case which has been resolved in favor of vessel status."); Richard J. McLaughlin, *Floating Casinos, Personal Injury and Death Claims, and Admiralty Jurisdiction*, 64 MISS. L.J. 439, 471 (1995) (stating that "powerless houseboats capable of being towed from one point to another" are vessels). For cases holding or assuming that houseboats are vessels, *see, e.g.*, *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Bass River*

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[34] Petitioner's briefing to this Court is unclear whether he contends that the apparatus was never a vessel or instead that it lost its vessel status at some point during its life with him.

[35] *See also Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) ("Cases referring to houseboats have uniformly held that a houseboat is a vessel in the context of a claim against the houseboat *in rem* asserting a lien for dockage").

Associates v. Mayor, 743 F.2d 159, 161 n.2 (3d Cir. 1984); *Sea Village Marina, supra*; *Midlantic National Bank v. Sheldon*, 751 F. Supp. 26, 27-29 (E.D.N.Y. 1990); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979); *The Ark*, 17 F.2d 446 (S.D. Fla. 1926); *Rogers v. A Scow Without a Name*, 80 F. 736 (E.D.N.Y. 1897); *Andreacchi v. Marina*, 887 N.Y.S.2d 824 (N.Y. Cty. Ct. 2009). For a congressional assertion or assumption of the vessel status of houseboats, *see* 33 U.S.C. § 1322(f)(1)(B) (classifying houseboats, including those "used primarily as [residences] and . . . not used primarily as a means of transportation" as vessels in the context of sewage-disposal requirements).

So, one sensible characterization of the decision below might be simply as a routine holding that the owner of a "houseboat/barge" failed to produce significant evidence that his particular craft was so unusual (by virtue of its original design or its mooring and towage history) as to be exempt from ordinary houseboat treatment.

2. The Government Misreads the Eleventh Circuit's Opinion.

The Government (at 29-31) argues that this Court should vacate and remand because the Eleventh Circuit's decision rested on bad law. On this point, the Government is mistaken.

The Government's statement (at 13) that the Eleventh Circuit had "essentially one and only one

reason" (three long tows) for finding vessel status is belied by the evidence summarized in Section I-B, *supra* at 6-8. In the aggregate, that evidence constituted a significant showing of the craft's practical capability to serve as a means of transportation across water. Perhaps even more significantly, the Eleventh Circuit also relied heavily on the failure of petitioner to offer any proper evidence to the contrary. Pet. App. 18a-19a.

It was also inaccurate for the Government to say (at 29) that the Eleventh Circuit "den[ied] the relevance" of the Coast Guard factors for evaluating the "permanently moored" status of "Craft Routinely Operated Dockside." In fact, those factors were never brought to the attention of the courts below, so no expression or indication of their relevance could have been conveyed.

The Government's claim (at 7) that the Eleventh Circuit rejected "'any definition of "vessel" that relies on [a boat's] purpose'" is deceptive. The Government was purporting to quote *Belle of Orleans* (which the court below fully endorsed). But putting "a boat's" into the brackets significantly distorts the relevant passage. This is what the *Belle of Orleans* court said:

> [N]either [the Seventh Circuit in *Tagliere* nor the Fifth Circuit in *De La Rosa*] articulates an appropriate test [for vessel status]. Both focus on the ***intent of the shipowner*** rather than whether the boat has been "rendered practically incapable of transportation or movement." [*Stewart*, 543 U.S. at 494.] The

> ***owner's intentions*** with regard to a boat are analogous to the boat's "purpose," and *Stewart* clearly rejected any definition of "vessel" that relies on ***such a purpose.***[36]

The Government should not have altered the *Belle of Orleans* court's phrase "such a purpose" to read "[a boat's] purpose"; it should instead have rendered the phrase as "[a shipowner's] purpose." In other words, the Government was wrong to interpret *Belle of Orleans* (and thus, by extension, the decision below) as rejecting any reliance on a watercraft's objectively-assessed design. What *Belle of Orleans* and the court below properly did was to reject any reliance on the watercraft owner's subjective intentions. *See* Section III, *supra* at 15-24; *see also* U.S. Brief 24-26.

The Government compounds the foregoing error by immediately following it with the statement that "the court of appeals concluded that it is irrelevant whether the structure is 'moored to a dock by cables, receive[s] power from land, and ha[s] no motive power or steering of its own.' Pet. App. 18a." U.S. Brief 7 (alterations in original). The relevant passage in the opinion below is at Pet. App. 17a-18a, where the Eleventh Circuit did ***not*** say or imply that the houseboat/barge's mooring and other objective characteristics were irrelevant; what it said was that *Pleason* shows that a barge's somewhat secure

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[36] *Belle of Orleans*, 535 F.3d at 1311 (emphasis supplied; footnote omitted).

mooring and lack of motive and steering capability do not necessarily defeat vessel status.

It is also important to recall that the Eleventh Circuit, having discussed the record evidence in some detail, had presumably seen in the record just how insecurely petitioner's houseboat/barge was moored to the dock by a "deteriorated" rope (JA 32) and that it received power from land through an ordinary extension cord (JA 33). There is no reason to assume that the Eleventh Circuit would have taken the same approach to a watercraft that really was "permanently moored" (as the casino boat in *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), was, for example).

3. The Eleventh Circuit's Judgment Was Correct, Even If Some of Its Language May Have Been Questionable.

Amici believe that the Eleventh Circuit was on solid ground in relying on the evidence summarized in Section I-B, *supra* at 6-8 (and on the petitioner's lack of countervailing evidence) to uphold vessel status. That alone is sufficient to affirm the judgment. Petitioner and the Government disagree with some further statements in the lower court's opinion that may be questionable (particularly when taken out of context), but none of those statements is necessary for the judgment.

First, petitioner (at 11) and the Government (at 7) accuse the Eleventh Circuit of making a watercraft's purpose irrelevant when deciding vessel status. But what the Eleventh Circuit should be understood to have held is simply that the owner's intent is irrelevant. *See* Section IV-B-2, *supra* at 27-30. As Section III, *supra* at 15-24, explains – and as the Government (at 24-26) agrees – the court below was correct to conclude that an owner's intent is irrelevant. To the extent that the opinion below may be read as stating that it would be irrelevant to consider purpose in the sense used in *Stewart* and discussed at the end of Section III-B, *supra* at 17-18, such a statement would be irrelevant dicta. If petitioner could be considered to have made such a purpose argument in the courts below, he offered no support for it and thus there would have been no need for the Eleventh Circuit to have responded to such an argument.

Second, petitioner (at 31) and the Government (at 13) distort the Eleventh Circuit's quotation of the phrase "to her detriment," *see* Pet. App. 18a (quoting *Belle of Orleans*, 535 F.3d at 1312), as suggesting that towability was enough to establish vessel status regardless of how much damage might be suffered in the process. That could not have been what the court of appeals meant. The court seriously considered petitioner's argument that his houseboat/barge suffered significant damage each time it was towed, but rejected the argument because his claims were "without any evidentiary support in the record." Pet. App. 18a. The court concluded that "absent a shred of

evidence [supporting petitioner's argument], and in light of the contradictory evidence of the actual voyages . . . ***this assertion alone*** cannot preclude" vessel status. *Id.* (emphasis added).

Moreover, the "to her detriment" remark was made in the context of an "addition[al]" reason to reject petitioner's argument. *Id.* Having already rejected that argument for petitioner's failure to support it with any evidence, the challenged remark was simply dictum. It was unnecessary to the judgment.

In any event, it is ambiguous what was intended. It seems obvious that a barge that sinks or comes close to sinking any time it is sought to be towed lacks practical transportation capability. Presumably the *Belle of Orleans* court, and thus the court below when it quoted *Belle of Orleans*, meant at most that a vessel does not lose its status simply because it suffers some damage while in navigation.

4. Remand Would Be Pointless.

As is noted in *Stewart*, sometimes the vessel-status inquiry will "involve factual issues for the jury." 543 U.S. at 496. Here there was no jury,[37] so the question is whether there were factual issues for the trial court in its capacity as trier-of-fact. On the

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[37] Because the proceeding was *in rem* against petitioner's houseboat/barge, it necessarily was in admiralty.

evidentiary record in the actual case below, there were no such issues.

Moreover, even assuming (however unlikely) a hypothetical remand in which petitioner is allowed to present new evidence and arguments supporting every legally relevant fact that he asserts in his narrative to this Court, the result would not change. An admiralty judge would not be justified in ruling that the houseboat/barge was a nonvessel as a matter of law. Petitioner's evidence might point toward practical incapacity for transportation use, but it is impossible to avoid the cogent relevance of the *Stewart* Court's observation that the watercraft at issue in that case "was not only 'capable of being used' to transport equipment and [persons] over water – it ***was*** used to transport those things." 543 U.S. at 495 (emphasis in original). Petitioner's houseboat proved its practical transportation capability when it carried itself and its contents among different marinas in North Bay Village, across navigable water from North Bay Village to Riviera Beach, and again from Riviera Beach to Miami. Moreover, the Coast Guard's "permanent mooring" factors would continue to preponderate in favor of vessel status.[38]

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[38] *See supra* note 25.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-626

In The
Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a houseboat that was towed several times over hundreds of miles and then moored with deteriorated ropes in a public marina, where it received power through a 50-amp extension cord and water through a garden-type hose, constitute a "vessel" under 1 U.S.C. § 3, thus supporting federal admiralty jurisdiction?

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA").[1] The UBCJA is an international labor organization with affiliates in the United States and Canada. It currently enjoys a total membership of more than 500,000 working men and women. Many of those men and women are employed upon navigable waters building, repairing, maintaining, or demolishing piers, wharves, bridges, breakwaters, offshore oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. In order to perform this work, those members often develop employment-related connections that are substantial in both nature and duration with crane ships, drilling ships, tug boats, dive boats, derrick barges, spud barges, pile driving barges, dredges, jack-up rigs, work-over rigs, and other special-purpose vessels. This connection gives UBCJA members access to a "trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive

---

[1] Pursuant to Supreme Court Rule 37.6, the UBCJA states that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* or its counsel contributed money to the preparation or submission of this brief. The parties have consented to the filing of all *amicus* briefs; their consent letters have been filed with the Clerk.

because of their exposure to the 'perils of the sea.'"[2] It also invests them with the special lien and wage rights traditionally afforded seamen.[3] But the watercraft those members serve typically remain moored and stationary for extended periods of time. The Petitioner's contention that such watercraft can lose their vessel status threatens the rights UBCJA members enjoy under maritime law.

SUMMARY OF ARGUMENT

Petitioner Fane Lozman and his *amici* have asked this Court to revisit 1 U.S.C. § 3 – a general Rule of Construction that defines the word "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." When it last considered that statute, this Court held that "a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 497

[2] These remedies include the rights to sue for Jones Act negligence, unseaworthiness, and maintenance, cure, and found. *Chandris v. Latsis, Inc.*, 515 U.S. 347, 354 (1995).

[3] It has been settled for more than a century "that all persons employed on a vessel to assist in the main purpose in which she is engaged are entitled to a lien for wages" that may be exercised *in rem* against the vessel herself. *Saylor v. Taylor*, 77 F. 476, 478 (4th Cir. 1896).

(2005). Hoping to breathe new life into the "purposive approach" to vessel status, Pet. Br. at 14, Petitioner and his *amici* urge this Court to hold, as a matter of law, that Petitioner's "Homemade Custom Houseboat/ Barge," JA79, does not fall within the ecumenical embrace of this definition.

Petitioner and his *amici* have offered many arguments in support of their purposive interpretation of § 3. The UBCJA takes respectful exception to all of those arguments – and none more so than the game assertion that vessel status should be allowed to hinge on the subjective intentions of the owner. But Respondent has answered each of Petitioner's arguments at length and the Government, one of Petitioner's own *amici,* agrees with Respondent and the UBCJA that vessel status should be determined by "objective criteria rather than the owner's subjective intentions." U.S. Br. at 24. This Brief will therefore focus on just three of the Petitioner's arguments, to wit, that:

> 1) the language of 1 U.S.C. § 3 "should be interpreted in light of the functional reasons for admiralty law and jurisdiction" and posted as a picket before the door to the admiralty courts, see Three Professors' Br. at 15;
>
> 2) "indefinitely moored floating structures," which are only "occasionally moved from place to place," comprise "extensions of land" and are not "practically capable" of marine transportation within the meaning of *Stewart* and 1 U.S.C. § 3, Pet. Br. at 16-25, and;

> 3) because waves no more than "three to four feet high" could enter Petitioner's houseboat through its "unsealed French doors" and poorly waterproofed "siding," it cannot be navigated for long distances without "emergency repairs to keep it afloat." Pet. Br. at 4-5.

I. The argument that 1 U.S.C. § 3 should be interpreted to help delimit the jurisdiction of admiralty and advance the substantive goals of maritime law (which we will call the "jurisdictional argument") strays far beyond the explicit language of the statute, cramps the broad sweep of its provisions, and threatens to steer the issue of vessel status back towards the prolix and confusing tests this Court jettisoned in *Stewart*.

II. The assertion that, over time, an indefinitely moored vessel loses its capacity for maritime transportation and becomes an extension of land (which we will call the "temporal argument") misconstrues the governing cases, misapplies the phrase "extension of land," ignores the "special-purpose doctrine," threatens to overturn traditional understandings about what constitutes a vessel, and promises to leave an armada of vital and specialized watercraft high and dry.

III. The assertion that Petitioner's houseboat was not sufficiently "seaworthy" to navigate safely or even be a vessel (which we will call the "seaworthiness argument") distorts and misuses that term and

forgets that the existence of a vessel is a *sine qua non* for unseaworthiness.

ARGUMENT

I. Petitioner's Jurisdictional Argument Lacks Merit

A. This court should decline any invitation to read more into the meaning and purpose of § 3 than Congress plainly intended

As *Stewart* explained: "Section 3's definition, repealed and recodified in 1947 as part of the Rules of Construction Act, 1 U.S.C. § 3, has remained virtually unchanged from 1873 to the present [and] continues to supply the default definition of 'vessel' throughout the U.S. Code[.]" 543 U.S. at 489-90 (citations omitted). Petitioner and his *amici* argue that "the term 'capability' for transportation in 1 U.S.C. § 3 should be interpreted in light of the functional reasons for admiralty law and jurisdiction." Three Professors' Br. at 15; see also Pet. Br. at 35-47. According to the three professors who support Petitioner, "'the definition of vessel should reflect these principal considerations: (1) the functional reasons for applying admiralty law to particular subjects of interstate and international commerce; (2) the adequacy of state law in addressing those subjects, and conversely, (3) the intended and unintended consequences of applying admiralty law." Three Professors' Br. at 4.

The UBCJA respectfully disagrees. "Where the language of the act is explicit, this [C]ourt has said, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 37 (1895) (internal quotation marks and citations omitted). "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); see also *Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982) ("statutory construction must begin with the language of the statute itself, and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive") (internal quotation marks, brackets, and citations omitted).

Although "§ 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law[,]" *Stewart*, 453 U.S. at 490, the plain language of that statute carries no explicit indication that Congress intended to post this codification like a sentry before the doors to the admiralty courts. If anything, experience with the issue shows that purposive vessel definitions can make very poor gatekeepers.

B. Experience shows that a purposive-based vessel status test is not a suitable instrument for defining the proper ambit of admiralty jurisdiction or advancing the substantive goals of maritime law

Petitioner argues that the term "vessel" must be construed "not only in light of the text of Section 3 and its history and precedent," but also with an eye to "the purposes of the substantive laws that Section 3 is intended to subserve and the reasons on which they rest." Pet. Br. at 35 (internal quotation marks, brackets, and citations omitted). By way of example, Petitioner and his *amici* note that: "The applicability of several statutes, such as the Jones Act,[4] the Longshore and Harbor Workers' Compensation Act,[5] the Vessel Owners Limitation of Liability Act,[6] and the Outer Continental Shelf Lands Act,[7] may depend on whether a vessel is involved." Three Professors' Br. at 14. But in truth, the courts have had very little success staking out the coverage of those statutes with the instrument of vessel status.

The Jones Act provides a perfect example. As this Court explained when it sat down to sort out the question of Jones Act coverage during the 1990's, "we

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[4] 46 U.S.C. § 30104.

[5] 33 U.S.C. §§ 901 *et seq.*

[6] 46 U.S.C. §§ 30501 *et seq.*

[7] 43 U.S.C. § 1333.

have made a labyrinth and got lost in it." *Chandris*, 515 U.S. at 356 (citation omitted). One of the most confounding corridors of that labyrinth grew up around the issue of vessel status. While the Ninth Circuit adhered to the default definition spelled out in 1 U.S.C. § 3, see e.g. *Estate of Wenzel v. Seaward Marine, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983), the Fifth, Eleventh, and Second Circuits took a purposive approach – which they dubbed the "floating work platform doctrine" – and undertook to limit Jones Act coverage to cases involving watercraft that were "designed or used primarily for the transportation of passengers, equipment and cargo." *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 828-29 (5th Cir. 1984); see also *Hurst v. Pilings & Structures*, 896 F.2d 504 (11th Cir. 1990); *Tonnensen v. Yonkers Contracting Co.*, 82 F.3d 30 (2nd Cir. 1996).[8] The First Circuit

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[8] The story of the "floating work platform doctrine" provides a cautionary tale for this case. See gen. David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 14-15 (1992) (criticizing the doctrine as "prolix," "extremely flabby," and wholly beside the point). It was based on three "non-requisite criteria" and nine "free-floating factors." *Id.* The "non-requisite criteria" queried whether: "(1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms." *Bernard*, 741 F.2d at 831. The free floating factors looked to whether the structure has "(1) navigational aids; (2) [a] raked bow; (3) lifeboats and other lifesaving equipment; (4) bilge pumps; (5) crew quarters; . . . (6) registration as a

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added a twist of its own when it held that "if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (*en banc*) (original emphasis). As one of Petitioner's *amici*, Professor Thomas Schoenbaum, lamented in a contemporary edition of his text: "With this surfeit of doctrine to chose from, it is not surprising that there are many close cases on vessel status – approaching the point of arbitrariness." 2 Thomas J. Schoenbaum, *Admiralty and Maritime and Maritime Law*, § 6-9 (3d ed. 2001).

In an effort to clarify and stabilize Jones Act coverage, this Court agreed to review the issue of seaman status no fewer than five times between 1991 and 2005.[9] This is "a remarkable record for any area

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vessel with the Coast Guard"; (7) the ability to float; (8) the ability to move; and (9) a recent history of movement. *Id.* at 832 n. 25. These factors are not unlike the "objective criteria" the Government proposes at pages 28 and 29 of its *amicus* brief. See also 74 Fed.Reg. at 21,815. The UBCJA cannot see how the Government's purposive criteria are likely to produce case-by-case results that are any more rational or predictable than the results obtained under the prolix work platform doctrine.

[9] In addition to *Stewart v. Dutra Const. Co.*, *supra*, those five cases included *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) (holding that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a ship repairman employed at a shipyard was not limited to

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of the law." *Cabral v. Healy Tibbitts Builders*, 128 F.3d 1289, 1291 (9th Cir. 1991). The resulting constellation of decisions framed the current "twofold" test for seaman status (distinguishing "the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel[,]" *Chandris,* 515 U.S. at 368) and culminated with the lodestar holding in *Stewart* that "a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." 543 U.S. at 497. As that holding took pains to point out:

> By including special-purpose vessels like dredges, § 3 sweeps broadly, but the other prerequisites to qualifying for seaman status under the Jones Act provide some limits, notwithstanding § 3's breadth. A maritime worker seeking Jones Act seaman status must also prove that his duties contributed to the vessel's function or mission, and that his connection to the vessel was substantial both in nature and duration. Thus, even

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a remedy under the LHWCA but could also be a seaman under the Jones Act if he had an employment-related connection to a vessel in navigation); *Chandris, Inc. v. Latsis*, *supra*, (setting forth a two-prong test for seaman status designed to distinguish sea-based maritime workers from land-based employees); and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (holding that a showing of common ownership or control is required when evaluating the plaintiff's employment-related connection to group of vessels in navigation).

> though the *Super Scoop* is a 'vessel,' workers injured aboard the *Super Scoop* are eligible for seaman status only if they are 'masters or members' of its crew.

543 U.S. at 494-95. This passage confirms that the vessel definition in § 3 is not the best tool for constraining Jones Act coverage, much less admiralty jurisdiction generally,[10] because the statute was ***designed*** to sweep broadly. The Petitioner and his *amici* overlook this truth.[11]

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[10] In *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court upheld admiralty tort jurisdiction over a vessel owner's limitation of liability proceeding arising out of a fire that damaged a number of vessels berthed near one another in a Lake Michigan marina after starting in the washer/dryer unit of "a 56-foot pleasure yacht" named the *Ultorian*. *Id.* at 360. Petitioner Lozman's arguments would suggest that this Court should have ruled against jurisdiction in *Sisson* if that washer/dryer unit had not caught fire aboard the *Ultorian*, but aboard a hypothetical houseboat berthed in the very next slip.

[11] Petitioner and his *amici* rely heavily on the Fifth Circuit's decision in *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995). See Pet. Br. at 11, 12, 34, and 35. Like *Stewart* and *Chandris*, that case also arose under the Jones Act. The plaintiffs were employed as a bartender and a cocktail waitress aboard a casino boat named the *Biloxi Belle*. *Pavone*, 52 F.3d at 562. The Fifth Circuit affirmed the dismissal of their claims on the ground that the *Belle* "was moored to the shore in a semi-permanent or indefinite manner." *Id.* at 570. Although the Fifth Circuit's opinion hinged on the conclusion that the *Belle* was no longer "in navigation" at the time of the plaintiffs' injuries, *id* at 563, *Stewart* cited it for the proposition that "ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again." 543 U.S. at 494. The point the

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II. Petitioner's Temporal Argument Is Also Fundamentally Flawed

A. Watercraft like Petitioner's houseboat do not forfeit their vessel status, become extensions of land, or lose their capacity for marine transportation merely because they only navigate occasionally

Because his houseboat had not been moved for more than three years by the time it was seized, Petitioner argues that it had become "an indefinitely moored structure that functioned as an extension of land." Pet. Br. at 16. He rests this argument on *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926); and *Roper v. United States*, 368 U.S. 20 (1961). According to Petitioner, these cases hold that "only structures whose purpose is transportation fall within the ambit of Section 3."

UBCJA wishes to make is that, if the trial court in *Pavone* had only applied the other prerequisites for seaman status, it never would have reached the issue of vessel status. While the plaintiffs in *Pavone* may have contributed to the *Belle's* mission as a floating drinking and gambling establishment, there is nothing in the opinion to suggest that they ever worked aboard the casino while it was anywhere but dockside, tied fast to its berth. As a consequence, they did not face the perils of the sea or exhibit a connection to the *Belle* that was substantial in ***nature***. As *Stewart* explains, this is the prerequisite which best limits the ambit of the Jones Act, not the broad sweeping vessel definition in § 3. 543 U.S. at 497.

Pet. Br. at 16. There are several things wrong with this construction.

First, at risk of belaboring the point, § 3 only requires that a vessel be "capable of marine transportation" and not that it be used solely, persistently, or primarily for that purpose. 543 U.S. at 495, 497. The fact that Petitioner used his houseboat primarily as a floating residence is neither dispositive nor even particularly relevant. The *Super Scoop* – the mud dredge in *Stewart* – was used primarily to dig an underwater trench for the Ted Williams Transit Tunnel to Logan Airport. But as this Court explained, "the *Super Scoop* was not only 'capable of being used' to transport equipment and workers over water, . . . it could not have dug the Ted Williams Tunnel had it been unable to traverse the Boston Harbor, carrying with it workers like Stewart." 543 U.S. at 495. By the same token, the "Houseboat/Barge" in this case could not have served as Petitioner's residence in Riviera Beach had it not been able to traverse the Intercoastal Waterway, first from Fort Meyers, and later from North Bay Village whence it carried Petitioner's household goods and furniture. JA71-72, 73-74, 77-78, 83.

Nor should Petitioner be heard to describe his houseboat as a "fixed structure" or "an extension of land." See Pet. Br. at 16. Phrases like that refer not to watercraft possessing "'mobility and the capacity to navigate,'" but to permanently-rooted port facilities

like "wharves, drydocks, and bridges." *Stewart*, 543 U.S. at 494, quoting *The Alabama*, 19 F. 544, 546 (1884).

Petitioner's reliance on *Cope* and *Evansville* is also misplaced. As *Stewart* explained, "*Cope* and *Evansville* did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor." 453 U.S. at 493-94. The houseboat at issue here floated on its own bottom, had been relocated several times by its owner, was only tied to its slip in Riviera Beach with a few "deteriorating" soft lines, and was required by the terms of its dockage agreement to "relinquish [its] berth when requested by the City" or, in the event of breach or termination, to be able to depart the marina on three days' notice. JA13-14, 17, 23-25, 31-33. The floating dry dock in *Cope*, by contrast, was "permanently moored by means of large chains" to the Algiers bank of the Mississippi and had to be "sparred off from the bank by means of spars, to keep it afloat." 119 U.S. at 627. For its part, the floating wharf in *Evansville* was permanently secured to a bank of the Ohio River "by four or five cables[,]" "was not taken from place to place" except for winter storage, and was used only as a gangway "to transfer freight between steamboats

and land and from one steamboat to another." 271 U.S. at 20.[12]

The *Roper* case is not apposite either. It involved a "mothballed" World War II liberty ship whose "supplies, stores, nautical instruments, cargo gear and tackle" had all been removed, whose "pipes and machinery" had been drained and "deactivated," and whose "rudder, tail shaft and propeller" had all been secured. 368 U.S. at 21. The dead ship in *Roper* was thus comparable, not to Petitioner's houseboat, but to the retired liberty ship in *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992). After being deactivated,

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[12] It is also worth noting that the owner of the floating structure in *Evansville* was seeking relief under the Vessel Owners Limitation of Liability Act. That Act has long been an object of judicial antipathy. See gen. Walter W. Eyer, *Shipowners' Limitation of Liability – New Directions for an Old Doctrine*, 16 Stan. L. Rev. 370, 371 (1964). As Chief Judge Kozinski observed in *Delta Country Ventures v. Magana*, 986 F.2d 1260 (9th Cir. 1993):

> The Limitation of Liability Act is an anachronism, a holdover from the days when encouraging commerce by sea was considered more important than providing full redress to victims of maritime accidents. As I have said before, such a law no longer makes sense. One of the many unfortunate consequences of the Limitation of Liability Act is that it leads courts to contort the law to avoid unjust results: Misshapen from the start, the subject of later incrustations, arthritic with age, the Limitation Act has provided the setting for judicial lawmaking seldom equaled.

Id. at 1266-67 (Kozinski J dissenting) (internal quotation marks and citations omitted).

that ship had been converted into a "permanently moored" shrimp processing plant, had seen "a large opening . . . cut into her hull to allow for dock traffic[,]" and would have "surely s[u]nk" had she put to sea. *Id.* at 660. While dead ships like these "do not remain vessels merely because of the remote possibility that they may one day sail again[,]" *Stewart,* 543 U.S. at 494, the houseboat in this case was not beached in a lonely backwater, entombed in a mothball fleet, cut open to facilitate dock traffic, chained to some forlorn stretch of waterfront, or converted to a brand new use; it was fully operational, still performing the mission for which it had been launched, berthed in a busy marina, and surrounded by other active vessels. Since Petitioner's houseboat could have easily cast off and resumed its itinerant voyages along the Florida coast any time Petitioner chose, the suggestion that it had somehow become a dead vessel while it was harbored in Riviera Beach, or had begun a new life as an extension of land, is just not supported by the facts or the caselaw.

B. Tinkering with § 3 in the manner Petitioner suggests could overturn well-settled understandings of what constitutes a vessel, deprive maritime creditors and claimants of important rights, and leave an armada of vital watercraft high and dry

Petitioner's assertion that watercraft lose their vessel status after they have been moored for an

indefinite period of time not only threatens to denude wharfingers, suppliers, and other waterfront creditors of traditional maritime lien rights, see e.g. *The Showboat*, 47 F.2d 286 (D.C. Mass. 1930),[13] it also ignores the "special-purpose doctrine" and attempts to capsize well-settled understandings about what constitutes a vessel.

The special-purpose doctrine sprang from the Fifth Circuit's decision in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and extended Jones Act coverage to any sea-based worker who contributed to the mission of "special-purpose structures not usually employed as a means of transport by water but

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[13] The admiralty court in *The Showboat* enforced maritime liens for services and supplies against a five-masted schooner, even though that schooner was chained to a wharf and being used as a restaurant and dance hall, because she was still "capable of being used, as a means of transportation on water" within the meaning of 1 U.S.C. § 3. *Id.* at 286. As the court explained, "if the sails which are now on board were bent on," the schooner "could go to sea; or she could be towed as she now is anywhere that a barge can be taken.") 47 F.2d at 287; see also *Erie v. S.S. North American*, 267 F. Supp. 875, 879 (W.D. Pa. 1967) (enforcing maritime liens for wharfage and lay-up expenses against a ship that was still "capable of being used, as a means of transportation on water" within the meaning of 1 U.S.C. § 3 even though she had been moored and inactive for almost two-and-one-half years); *New Westland Marina, LLC v. M/V Aquamist II*, 2011 U.S. Dist. LEXIS 94272, at *3-*4 (M.D. Fla. 2011); (recommending enforcement of a maritime lien against a 60-foot sportfishing vessel in favor of a marina that had run up unpaid "dry storage" fees after housing the vessel on blocks in a shoreside yard "pursuant to a written and signed agreement with the Vessel's owner").

designed to float on water[.]" 266 F.2d at 769.[14] This Court approved *Robison* in *McDermott Int'l v. Wilander*, 498 U.S. 337, 340 (1991),[15] and recognized

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[14] The doctrine was originally handed down to protect workers in the Gulf Coast's dangerous offshore oil industry. As the renowned admiralty jurist, Judge John Minor Wisdom, explained in *Robison*:

> There is nothing in the [Jones Act] to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. Many of the Jones Act seamen on these vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling.

266 F.2d at 780. The *Deepwater Horizon* catastrophe brings new resonance to Judge Wisdom's words. Petitioner's arguments threaten to scuttle *Robison* and deprive offshore oil workers of rights they now need more than ever.

[15] The defendant in *Wilander* asked this Court "to reject the *Robison* requirement that a seaman 'contribute to the function of the vessel or to the accomplishment of its mission,' in favor of the more stringent requirement of *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), . . . that seaman status under the Jones Act may be conferred only on employees who make 'a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.' 498 U.S. at 340 (some citations omitted). After granting certiorari "to resolve the conflict between the *Robison* and *Johnson* tests[,]" *id.*, this Court decided that "the time has come to

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in *Stewart*, 543 U.S. at 497, that the special-purpose doctrine could probably trace its provenance all the way back to *Saylor v. Taylor*, 77 F. 476 (4th Cir. 1896), which allowed workers engaged on a Potomac "mud dredge" to hold the dredge liable *in rem* for their unpaid wages on the ground that admiralty should treat as a seaman "[e]ach person aboard of her" who "performed a substantial part of his work on the vessel" and "contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 77 F. at 478.

Over the years, courts advancing the doctrine have upheld vessel status for all manner of stationary work craft including: floating pile driving rigs, *Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995); floating earth-removing machines, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); floating clamshell dredges, *Stewart v. Dutra Const. Co.*, *supra*; floating shipyard platforms, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); Texas Towers, *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958); movable drilling rigs, *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); submersible drilling rigs, *Producers Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966); work-over rigs, *Manuel*

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jettison the aid in navigation language" and adopted the *Robison* test. *Id.* at 353.

v. P.A.W. Drilling Well Service, Inc., 135 F.3d 344 (5th Cir. 1998); pipe-laying barges, *McDermott, Inc. v. Boudreaux*, 679 F.2d 452 (5th Cir. 1982); jack-up barges, *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002); crane barges, *Endeavor Marine v. Crane Operator, Inc.*, 234 F.3d 287 (5th Cir. 2000); construction scows, *George Leary Const. Co. v. Matson*, 272 F. 461 (4th Cir. 1921); derrick barges, *Summerlin v. Massman Const. Co.*, 199 F. 715 (4th Cir. 1952); spud barges, *Ducote v. V. Keeler & Co.*, 953 F.2d 1000 (5th Cir. 1992); suction dredges, *Ramos v. Universal Dredging Corp.*, 547 F. Supp. 661 (D. Haw. 1982); floating canneries, *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132 (9th Cir. 2002); flexi-floats, *Brunet v. Boh Bros. Constr.*, 715 F.2d 196 (5th Cir. 1983); floating dormitories, *Holmes v. Atl. Sounding Co.*, 437 F.3d 441 (5th Cir. 2006); submersible hull-cleaning platforms, *Estate of Wenzel v. Seaward Marine, Inc.*, 709 F.2d 1326 (9th Cir. 1983); and even floating movie props, *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392 (9th Cir. 1973).

It is axiomatic that "special-purpose craft such [as these] remain stationary while performing work, yet retain their vessel status." *Manuel*, 135 F.3d at 351. The pile driving barge in *Grubart*, for example, was firmly "secured . . . to the river bed with spuds, or long metal legs that project down from the barge and anchor it." 513 U.S. at 530. In *Senko*, this Court upheld vessel status for "the *James Wilkinson*, a craft which, though afloat, served as a stationary earth-removing machine." 352 U.S. at 376 (Harlan J.

dissenting). And the *Lucky Buck*, the floating cannery in *Martinez,* had "no means of self-propulsion[,]" had to "be towed in order to move," had been "granted permanently moored status" by the Coast Guard, "receive[d] water from a pipe connected to" the beach, was "accessible to land via a floating walkway[,]" and was held in place "by four anchors and a cable affixed to shore." 303 F.3d at 1134-35. As the *Martinez* court took pains to point out, the only differences between the *Lucky Buck* and the *Unisea* – the permanently moored shrimp processing plant in *Kathriner* – was that the *Lucky Buck* (like the houseboat in this case) was "not permanently moored, and unlike the *Unisea*, which was completely unfit for offshore use, [still had] the ability to navigate the seas." *Id.* at 1136. The Petitioner's argument that indefinitely moored watercraft lose their vessel status over time effectively calls upon this Court to overturn all this jurisprudence; such a result could lead the Jones Act back into the labyrinth[16] and deprive special-purpose seamen – like the *Super Scoop's* crew in *Stewart* – of rights and protections they have been guaranteed by a line of authority dating back to *Saylor v. Taylor, supra*. As the eminently experienced admiralty jurist, Judge W. Eugene Davis of the Fifth Circuit, remarked shortly before this Court handed down the lodestar opinion in *Stewart*:

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[16] See footnotes 5-8 *infra* and accompanying text.

> Admiralty judges have faced no greater challenge than that of adapting principles of general maritime law to the changing technology in structures claimed to be vessels in navigation, particularly in the context of determining whether a worker is a seaman.

W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1375 (2000-2001). The arguments of Petitioner Lozman and his *amici* threaten to redouble that challenge by dimming the bright-line holding in *Stewart*.

Petitioner's arguments also menace the vessel status of the nation's "Ready Reserve Force" – a fleet of 49 tankers, cargo ships, and heavy lift vessels that is owned by the Government, operated by the Maritime Administration, and berthed at strategically located ports chosen by the Department of Defense to facilitate the rapid deployment of military, peacekeeping, and humanitarian missions all over the world. See http://www.marad.dot.gov/ships. Ships from the Ready Reserve Force made major contributions to Operations "Desert Shield" and "Desert Storm" during 1990 and 1992, Operation "Restore Home" in Somalia during 1993, Operation "Uphold Democracy" in Haiti during 1994, and Operations "Enduring Freedom" and "Iraqi Freedom" from 2002 through 2008. *Id.* Ready Reserve ships were also mobilized to support relief efforts in the Carribean and along the U.S. Gulf Coast following Hurricanes

Katrina and Rita in 2005, Hurricane Mitch in 1998, and the Haitian earthquake in 2010. *Id.* Those ships are manned and maintained by civilian crews and pre-positioned at berths and wharves leased from commercial sources. *Id.* Depending on the international situation, Ready Reserve vessels can remain tied up for years at a time. *Id.* But they are never mothballed or deactivated and can be given orders to sail on just a few days' notice. *Id.* The UBCJA submits that, while standby units of the Ready Reserve Force exhibit no more capacity for marine transportation than Petitioner's houseboat, they are not only vessels, they are vessels vital to the national defense. A holding that would permit U.S. admiralty courts to view idled vessels from this Force as "fixed extensions of land" could undermine the commercial arrangements by which the Maritime Administration berths, supplies, maintains, and crews this vital fleet.

The temporal argument for Petitioner's purposive interpretation of § 3 thus threatens to narrow the U.S. Code's default definition for vessel status unduly. The three professors who support the Petitioner nonetheless warn that unless the broad sweep of § 3 is checked, it may ultimately distend the traditional jurisdiction and concerns of admiralty courts because:

> The nature and purpose of floating structures already vary widely. No doubt, with innovations in materials science, structuring engineering and computer-assisted design, many currently unheard of types of floating structures will be created in the future.

Three Professors' Br. at 16. But as this Court observed in *Stewart*, when it confirmed vessel status for special-purpose vessels and seaman status for the workers who crew them, "'such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world.'" 543 U.S. at 497, quoting *Saylor*, 77 F. at 479 (internal brackets omitted).

III. Respondent's Seaworthiness Arguments Are Also Unavailing

A. Neither the UBCJA nor Respondent contends that every contrivance which can be made to float is practically capable of marine transportation

At page 24 of his Brief, Petitioner quotes an excerpt from the following observation in *Petition of Kansas City Bridge Co.*, 19 F. Supp. 419 (W.D. Mo. 1937):

> We do not suppose, however, that th[e] statutory definition [in 1 U.S.C. § 3] is to be taken literally, since any contrivance that will float on water is capable of being used as a means of transportation (of things or persons) on water. The word "capable" in the statutory definition is to be read "practically capable."

Id. at 419. We agree with this observation – and with the holding in *Kansas City Bridge Co.* that a floating "boarding and rooming house" called the *Quarter Boat No. 130* was a vessel within the meaning of § 3 because it "was moved from place to place (at long or short intervals and with intermissions in winter months) as the scenes of [it's owner's] work under various river contracts changed." *Id.* As that holding explained: "The value of *Quarter Boat No. 130* lies in its movability, in the fact that its facilities can be transported from place to place." *Id.* at 420. The UBCJA respectfully submits that the same may be said of Petitioner Lozman's "Houseboat/Barge."

Petitioner and his *amici* nonetheless conflate the observation Petitioner quoted from *Kansas City Bridge Co.* with a follow-up statement that:

> "Anything can be towed, provided it can float. The fact that it is sufficiently seaworthy to be towed does not make it into a vessel."

Pet. Br. at 24 quoting George Rutherglen, "*Dead Ships*," 30 J. Mar. L. & Com. 677, 682 (1999); see also Three Professors' Br. at 10-11. Whether or not the first part of this follow-up statement is strictly true – mountain-sized ice bergs can float but it is impossible to imagine one of them being towed – the second part misstates and misuses the doctrine of seaworthiness.

B. Petitioner is distorting and misusing the doctrine of seaworthiness

As used in maritime law, the adjective "seaworthy" does not simply mean that the subject is capable of floating on the seas.[17] "Seaworthiness is a relative term" whose use assumes the existence of a vessel and whose requirements vary depending upon "the type of vessel and the nature of the voyage." *The Tug Ocean Prince, Inc. v. U.S.*, 584 F.2d 1151, 1155 (2nd Cir. 1978). The judge-made doctrine of seaworthiness entered American maritime law shortly after the Revolution, see *Dixon v. The Cyrus*, 7 Fed.Cas. 755, 757 (1789), and imposed certain strict, non-delegable obligations on U.S. vessel owners in their capacities, *inter alia*, as charterers, see e.g. *Work v. Leathers*, 97 U.S. (7 Otto) 379, 380 (1878), ocean carriers, see e.g. *The Caledonia*, 157 U.S. 124, 131 (1895), and the recipients of a tow. See e.g. *South, Inc. v. Moran Towing & Transp. Co.*, 252 F. Supp. 500, 506-07

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[17] It would be a mistake to assume that a houseboat like Petitioner's must literally be capable of sailing the seas to qualify as a vessel or invoke the doctrine of seaworthiness. The trial court in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), for example, permitted the family of a tugboat hand to sue for unseaworthiness after that hand lost his life on the Schuylkill River in Pennsylvania when a kerosene lamp on the deck of a low-lying scow his tug was towing ignited oily vapors rising off the water. *Id.* at 427-30. As this Court observed in *Stewart*, a vessel need not "'breast the angry waves of the Atlantic'" but may spend its life "'on the quiet waters of a Potomac creek'" or the protected reaches of Boston Harbor. 543 U.S. at 497 quoting *Saylor*, 77 F. at 479.

(S.D.N.Y. 1965), affirmed, 360 F.2d 1002 (2nd Cir. 1966).

But the doctrine's best known application, and the one that concerns the UBCJA here, is the well established principle that a vessel owner may be held liable "for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903). This liability flows from the vessel owner's duty to furnish seamen with "a vessel and appurtenances reasonably fit for their intended use." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). This duty "is absolute and completely independent of [the] duty under the Jones Act to exercise reasonable care." *Id.* at 549.

> A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.

Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 517-18 (1971).

Petitioner Lozman tries to scuttle his houseboat's vessel status by derogating its seaworthiness. He argues that waves no more than "three to four feet

high" could enter its hull through its "unsealed French doors" and poorly waterproofed "siding" such that it cannot be navigated for long distances without "emergency repairs to keep it afloat." Pet. Br. at 4-5. We need not and do not dispute the assertion that Petitioner violated his duty to maintain his vessel and its appurtenances in a condition that was reasonably fit for their intended use; the record shows that "[w]ater had collected in the bilge spaces below the main bedroom and the main hallway," that "the surface of the plywood evidenced deterioration and rot," and that the "[b]ilge pumps and automatic float switches [had been] neglected and were non-functional." JA38. But it is self-evident that a watercraft with a practical capacity for marine transportation cannot lose its status under 1 U.S.C. § 3 simply because a neglectful owner allows it to become unseaworthy. If that were the case, no one could ever sue for unseaworthiness. In order to bring such a claim, the claimant must first establish that he or she had "an employment-related connection to a ***vessel*** in navigation." *Chandris,* 515 U.S. at 353 (emphasis added). If, as Petitioner argues, unseaworthiness robs watercraft of their status under § 3, a breach of the duty to furnish a vessel that is reasonably fit for its intended use would cannibalize the right to seek indemnity for that breach. As Respondent pointed out in note 24 on page 50 of its Brief, Congress could have scarcely intended to create such a Catch-22 when § 3 was recodified in 1947.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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